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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-315

WHITE MOUNTAIN BROADCASTING CO., INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

4/9/79

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August 28, 1979

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v.

FEDERAL COMMUNICATIONS COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner White Mountain Broadcasting Co., Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 9, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix B hereto, at p. 7a. The decisions of the Federal Communications Commission are reported at 60 F.C.C.2d 342, and at 61 F.C.C.2d 472, and are set forth in Appendix B, beginning at pp. 27a and 20a, respectively. The initial decision of the Administrative Law Judge of the Federal Communications Commission, not reported, is set forth in Appendix B hereto, beginning at p. 56a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 9, 1979. A timely

petition for rehearing was denied on May 30, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred and violated its own precedent in affirming the Federal Communications Commission's denial of a license renewal to a small broadcaster for violation of an agency rule, when the Commission has consistently granted renewal to "media barons"* which were culpable of far more serious offenses, including criminal acts violative of statutes and Congressional policies.

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* The term was coined by former F.C.C. Commissioner Nicholas Johnson. See Johnson, Commentary on "The Media Barons", Washington Post, p. B-4 (March 28, 1971).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

This case involves Amendment V of the United States Constitution; Title 5, § 706(2)(A-D) of the United States Code; Title 47, §§ 307(d) and 309(a), (e) of the United States Code; and Title 47, Code of Federal Regulations, § 73.1205. These are set forth at Appendix A, infra, pp. 1a to 4a.

STATEMENT OF THE CASE

The Communications Act of 1934, 47 U.S.C. §§ 301 et seq. ("Act") authorizes the Federal Communications Commission ("F.C.C.") to grant, rescind and renew broadcasting licenses. Each year, the F.C.C. processes thousands of these applications, from the great mass of broadcasters and from the few media barons.

Over the years, virtually unchecked, the F.C.C. has pursued a course of invidious discrimination in the administration of its renewal policies. It has treated the great mass of broadcasters by one standard, and it has consistently cosseted and preferred a privileged group of media barons whose names are household words: General Electric Company, Westinghouse Electric Company, the Radio Corporation of America and its subsidiary, National Broadcasting Company, and CBS, Inc.

In case after case, before, during and after the pendency of the instant petitioner's application for license renewal, the F.C.C. has enforced a dual standard of judgment, putting out of business comparatively petty offenders against regulatory standards, while condoning the misconduct or merely slapping

the wrists of the media barons when their acts, criminal or otherwise, have done serious injury to the public. At no time have they been given the death sentence meted out to small broadcasters.*

The instant case, in which the Court of Appeals affirmed an application of the F.C.C.'s practice of prejudicial treatment, arose as a result of an F.C.C. investigation into allegations that the

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* See letter of December 11, 1978 from Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of Appeals, District of Columbia Circuit. At page 2 the letter reveals that between 1961 and 1978 fifty-nine radio stations were denied renewal of their licenses due to investigations undertaken in response to public complaints or to the F.C.C.'s own investigations. Attachment C to that letter reveals that only the licenses of small stations, and not those of media barons, were denied renewal.

petitioner, White Mountain Broadcasting Co., Inc. ("White Mountain") engaged in double billing. That trade practice, which arose in the newspaper field and has been carried over into broadcasting, is accomplished when the broadcast licensee sends two bills to the local dealer in manufactured goods, one for the true cost of the advertising broadcast and the other for an inflated amount. The larger bill is sent on to the manufacturer or supplier, who has agreed to share the cost of advertising with the local dealer, as the basis for obtaining reimbursement. As a result, the manufacturer pays for all of the advertising.

The F.C.C. decided specifically to eliminate double billing, and in 1965 proscribed it by regulation. See 47 C.F.R. § 73.1205, set forth at p. 3a of Appendix A, infra. Double billing plainly

is an infraction of F.C.C. policy, but it does not directly affect the public. Unlike the criminal and other offenses against strong public policy committed by the media barons, it does not limit or affect the fare offered to the audiences; nor does it mislead the audiences as do, for example, rigged quiz shows or fraudulent sports contests.

The F.C.C., acting for reasons not set forth in the record, commenced an on-the-scene investigation of White Mountain. Robert Powell, the owner and chief executive, freely and fully admitted the facts pertaining to the double billing. The F.C.C. continued to act in a manner starkly contrasting with its treatment of the media barons. Without any preliminaries, White Mountain had its renewal application designated for an evidentiary hearing.

At the hearing, White Mountain sought and was refused permission to introduce evidence about its service to the community. The hearing focused singly and narrowly on the double billing. Following the hearing, the F.C.C. denied White Mountain's application for renewal of its license to operate WMOU and WXLQ (FM) in Berlin, New Hampshire.* White Mountain Broadcasting Co., Inc., 60 F.C.C.2d 342 (July 12, 1976), recon. denied, 61 F.C.C.2d 472 (October 12, 1976). These decisions are set forth in Appendix B, at pp. 27a and 20a, respectively.

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* When a licensee is denied renewal, he loses virtually his entire investment in the station. The value of the physical assets, in comparison with the value of the station as a going concern, is small.

Before the Court of Appeals, which took jurisdiction to review pursuant to 47 U.S.C. § 402(b), White Mountain argued that the denial of its renewal application was an act of invidious discrimination. White Mountain pointed out that such corporations as General Electric, Westinghouse and CBS had committed grave violations of antitrust and other laws of immense public significance, and had been excused without sanctions anywhere near as onerous as a death sentence.

Furthermore, White Mountain pointed out that in those cases - even in the instances in which criminal violations had been proved - the F.C.C. has revealed its bias and favoritism by failing to undertake investigations and to hold hearings of the type to which White Mountain was subjected. Indeed, contemporaneously with the pendency of the

appeal, the F.C.C. was exercising such favoritism toward a media baron, CBS, whose actions had violated fundamentals of public policy.* When investigating CBS, the F.C.C. proceeded by informal methods, not by an investigation designed to ferret out violations of which the F.C.C. initially may not have been aware.

The Court of Appeals on April 9, 1979, affirmed the F.C.C.'s White Mountain decision. The opinion is set forth in Appendix B, beginning at p. 7a, infra. It dismissed, in two sentences in the last paragraph, White Mountain's contention that its being

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* See CBS, Inc., 69 F.C.C.2d 1082 (1978) (mendacious portrayal of tennis tournament in which, in fact, contrary to the public impression, all contestants received "prize" money; subsequent lies to F.C.C.; only penalty was to shorten the term of renewal).

put out of business would be yet another manifestation of the F.C.C.'s systematic pattern of invidious discrimination. See Slip Op. at 13, set forth in Appendix B at p. 19a, infra.

It is particularly astonishing that the Court of Appeals rejected White Mountain's bias argument, since that Court showed its awareness of the F.C.C.'s discriminatory pattern, noting that in some

> "instances the F.C.C. had granted renewals to licensees guilty of criminal violations of the anti-trust laws,[*]...while in others the agency found non-criminal conduct to be a sufficient basis for a failure to renew...."

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[*] The Court of Appeals opinion cited the justifiedly notorious cases of General Electric Co., 45 F.C.C. (Part II) 1592 (1964) and Westinghouse Broadcasting Co., 44 F.C.C. (Part II) 2770 (1962). See Slip Op. at 10, set forth in Appendix B at p. 14a, infra.

Slip Op. at 9, set forth in Appendix B at p. 15a, infra.

The opinion of the Court of Appeals also rejected - again in error, we argue - White Mountain's contention that the F.C.C. decision should have explained the reasons for its Draconian treatment of White Mountain, in the face of milder treatment of media barons whose offenses have nationwide effect. See Slip Op. at 12, 13, at pp. 18a, 19a of Appendix B, infra.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW INCORRECTLY ENDORSED A COURSE OF SIGNIFICANT AND INVIDIOUS APPLICATION OF A DUAL STANDARD OF JUSTICE IN THE ADMINISTRATION OF THE COMMUNICATIONS ACT OF 1934.

It is axiomatic that the

> "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

Mary Carter Paint Co. v. Federal Trade Commission, 333 F.2d 654, 660 (5th Cir. 1964) (concurring opinion), rev'd on other grounds, 382 U.S. 46 (1965).

The F.C.C. has for many years administered the Communications Act of 1934, in relevant part 47 U.S.C. §§ 301 et seq., in a discriminatory fashion for which the purposes of the Act provide

no justification. In so doing, the F.C.C. has violated the Administrative Procedure Act, 5 U.S.C. §§ 501 et seq., and has contravened the constitutional requirements of due process and equal protection, all in violation of the governing decisional law. The constitutional and statutory provisions involved in the instant petition are set forth in Appendix A, beginning at p. 1a, infra.

The F.C.C.'s non-renewal of the license of White Mountain for the objectionable practice of double-billing is such a discriminatory action. And the Court of Appeals' affirmance of the F.C.C. action is inconsistent with its own decision in Melody Music, Inc. v. Federal Communications Commission, 345 F.2d 730 (D.C. Cir. 1965).

In that case, the F.C.C. denied renewal of a local station's license,

while the network with which that station was affiliated was granted renewal. The owners of the station had produced a rigged quiz show series which NBC broadcast to the entire nation. NBC's license was renewed, as the White Mountain Court phrased it, "without as much as a reference to the network's role in the episode." Slip Op. at 9, set forth in Appendix B at p. 9.

Although the White Mountain opinion sought to distinguish Melody Music, it should instead have pointed out that the prejudicial treatment of White Mountain was even more egregious, since White Mountain had been penalized not for the same offensive conduct as the networks but rather for a far less serious offense. The White Mountain Court was aware that NBC's efforts in Melody Music to insulate itself from responsibility

for the rigged shows were, at best, disingenuous. It wrote that NBC "had turned its back on evidence that [the quiz shows] might be counterfeit." Id.

The injustice done to White Mountain is greater than the injustice done to Melody Music, because the offense committed by White Mountain was far less serious in relation to the offenses of the leniently-treated media barons than was the offense committed by Melody Music. The decision of the Court of Appeals in White Mountain, therefore, cannot stand with its own decision in Melody Music.

As an additional example of the F.C.C.'s indulgent handling of the media barons,* consider the F.C.C.'s

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* See also the General Electric and Westinghouse cases cited at p. 12, supra.

action--or, rather, inaction--upon remand of United States v. Radio Corporation of America, 358 U.S. 334 (1959). The Supreme Court had suggested that RCA and NBC had engaged in predatory anticompetitive practices. Upon remand the F.C.C. found indeed that defendants' conduct had been coercive, but even in the face of its own Uniform Policy as to Violations by Applicants of the Laws of the United States, 16 F.R. 3287, 1 R.R. § 91.495 (1951), the F.C.C. renewed the licenses of the NBC stations. United States v. Radio Corporation of America, 186 F. Supp. 776 (E.D. Pa. 1959); National Broadcasting Company, Inc., 37 F.C.C. 427 (1964).

The F.C.C.'s treatment of White Mountain contravenes its own pronouncements. For example, in Melody Music, Inc., 2 F.C.C.2d 958, 962, 6 R.R.2d

973, 978 (1966), the Commission addressed itself to the problem of the double standard.

> "[To] forfeit the license of applicant here while renewing the licenses of Westinghouse, GE and NBC is, in effect, to set a higher standard for small than for large corporations and to permit large corporations greater latitude than is permitted small corporations. The diffusion of responsibility and the separation of ownership and management which occur in large corporations tend to obscure the fact that the misconduct of corporate agents should have no different consequences than the misconduct of principals or individual licensees."

See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1975) (an agency finding supported by substantial evidence "may nonetheless reflect arbitrary and capricious action" where large and small parties are treated differently by a tribunal; evidentiary bias); Keen Transport, Inc. v. United States, 446 F.

Supp. 5 (E.D. Ohio 1976) (procedural bias).

The dual standard of treatment has manifested itself and has been applied to the detriment of White Mountain in at least four cardinal ways.

A. Invidious Choice of Investigative Method. First, when undertaking its investigations of misconduct, the F.C.C. approaches the media barons with circumspection, broaching its inquiries through the broadcaster's counsel or high executives. In contrast, the approach to the personnel of the small stations such as White Mountain is made directly, as a field investigation.

Although the offenses and coverup by, for example, CBS,* were vastly more serious than the offense of White Mountain, in

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* CBS, Inc., 69 F.C.C.2d 1082 (1978).

the investigation of CBS the F.C.C. held no evidentiary hearing. The agency substituted conjecture favorable to CBS for the facts unfavorable to it which a hearing might have brought forth. Moreover, the evidentiary hearing to which White Mountain was subjected, and CBS was not, is a far more onerous and expensive procedure than is the informal, almost collegial, style of investigation employed against CBS.

The indulgent F.C.C. treatment of the media barons has persisted despite admonitions from reviewing courts. In this respect, the Court of Appeals opinion conflicts with decisions which have required that all parties similarly situated should be afforded the same procedural opportunities.

White Mountain has been subjected to an entirely different investigative

procedure than, for example, NBC. When the Philco Corporation directed allegations of anticompetitive behavior against NBC, the F.C.C. conducted an informal investigation, rather than submitting those allegations to an evidentiary hearing of the type employed against White Mountain. Its failure was condemned in Philco Corporation v. Federal Communications Commission, 293 F.2d 864 (D.C. Cir. 1961). Despite that condemnation, the F.C.C. never carried forward its investigation against the serious violations of law and public interest which Philco had alleged. In contrast, the F.C.C. has denied renewal of licenses in "double billing situations" after field investigations as a matter of course. See Slip Op. at 13, set forth in Appendix B at p. 19.

B. Discriminatory Limitation of Evidence Considered for Agency Determination. The Court of Appeals decision conflicts with cases which have held to be arbitrary the penalties inflicted by tribunals which afford different procedural or evidentiary treatment to different litigants, when that difference does not serve the purposes of the statute which the tribunal is charged with enforcing. For example, in Arkansas-Best Freight System, Inc. v. United States, 364 F. Supp. 1239 (W.D. Ark. 1973),* a court enjoined the Interstate Commerce Commission from issuing orders arrived at after a hearing in which large motor carriers, but not their smaller competitors, were

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* Rev'd on other grounds, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1975).

allowed to introduce certain categories of evidence. In Cosmopolitan Broadcasting Corporation v. Federal Communications Commission, 581 F.2d 917 (D.C. Cir. 1978), in which the evidence admitted at a hearing was found to have been unduly limited in comparison with agency treatment of similar situations, the Court of Appeals directed the F.C.C. to consider public service and meritoriousness.

The Court of Appeals should have remanded White Mountain's case as well. By treating double billing as a per se offense, thereby precluding the introduction of evidence as to the meritoriousness of the station's service, it treated White Mountain prejudicially - first, because double billing is an offense typically committed by the management of small rather than large stations, and second, because the offenses committed

by the media barons are not accorded the inherently arbitrary and prejudicial per se treatment.

The F.C.C. should be required to treat those accused of petty violations, and those accused of offenses of great magnitude, at least with even-handedness - especially where those accused of the petty offenses are subject to and typically receive penalization equal to or greater than that inflicted upon the major offenders.

C. Draconian Sanction. Should a single owner be found to engage in double billing, he is subject to loss of his license, a death sentence - without regard to the meritoriousness of his service, to his degree of moral fault, or the the amount of public harm, if any, which his actions may have caused. On the other hand, the sanction typically imposed upon the media

baron, even when its violations are of far greater magnitude, is short-term renewal of one of its licenses. See, e.g., CBS, Inc., 69 F.C.C.2d 1082 (1978).

At least two courts have recognized that a sanction of loss of a license inflicted upon an individual businessman is punitive. See Beck v. Securities and Exchange Commission, 430 F.2d 673 (6th Cir. 1970); see also Didriksen v. Federal Communications Commission, 254 F.2d 354 (D.C. Cir. 1958) (W. Burger, Circuit Judge). One of those courts, the Sixth Circuit, found the punitive sanction to be arbitrary and an abuse of discretion because the severe sanction was exacted after a limited disciplinary hearing. (The evidence permitted before that tribunal, in fact, was less restricted than the hearing which the F.C.C. afforded White Mountain when it faced the

loss of its license).

D. Preclusion of a Reasoned Explanation of Agency Action. Double billing has been treated as a per se offense, disqualifying an applicant from renewal of his license regardless of the meritoriousness of his service. Since meritoriousness was not weighed against misconduct, White Mountain, and any reviewing court, are deprived of the means by which to assess the rationale and the legality of the F.C.C.'s decision.

Time and again, the courts have held that the party affected by agency action is not to be left uninformed of the foundation upon which the action rests; nor should the court which reviews such action be left to guess about the adequacy of the process below. The opinion of the Court of Appeals which White Mountain seeks to reverse was simply

wrong on this point: even where agency action is said to be grounded upon an obvious point of fact or law, the agency is obligated to spell out that grounding for the reviewing court. See, e.g., Melody Music v. Federal Communications Commission, cited supra at 15; Office of Communications of the Church of Christ v. Federal Communications Commission, 560 F.2d 529 (2d Cir. 1977); Contractors Transport Corporation v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976) ("the grounds...must be reasonably discernible from its report and order"); Frozen Food Express, Inc. v. United States, 535 F.2d 877 (5th Cir. 1976) (lack of even-handed treatment should, at least, be explained). Professor Kenneth Culp Davis considers that the case law "overwhelmingly supports" the requirement of explanation of any deviation from agency precedent (e.g., in the treatment of the media barons) or

from even-handedness. Davis, Administrative Law Treatise, 1978 Supp. § 17.07 at pp. 132, 133. "The case law cuts across the circuits and across the agencies." Id.*

It is particularly invidious that the per se treatment of double billing has operated in a systematic fashion, arbitrarily and capriciously, to disenfranchise totally the small businessman who commits that offense, and to cut off effective judicial review. See,

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* Professor Davis does not believe that Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973) is discordant with the cases requiring explanation of agency use of inconsistent rules of decision or disparate degrees of procedural constraint. In his view, the Butz case, often cited as vitiating the cases requiring explanation of differential treatment, focused only on the question of whether a reviewing court should itself modify the penalties assessed below. Davis, Administrative Law Treatise, 1976 Supp. § 17.07-4, at 416.

e.g., Columbia Broadcasting System, Inc. v. Federal Communications Commission, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (requirement of explanation); Greyhound Corporation v. Interstate Commerce Commission, 551 F.2d 414 (D.C. Cir. 1977), cert. denied, ____U.S. ____, 97 S.Ct. 2178. The media barons' larger offenses, when investigated and penalized at all, are not given such summary treatment. As a result, the typically milder F.C.C. action regarding those larger offenses is explained, and is thereby open to comprehension, scrutiny and judicial review in a way in which the "capital punishment" to which the small entrepreneur is subject, is not.

E. Summary: A Classic Case of Continuing Systematic Discrimination. In sum, the decision below calls for review by this Court because it erroneously

affirmed F.C.C. action which contravened elementary fairness and the F.C.C.'s own policy, which employed a surprise and searching investigative method which it uses against the small broadcasters but not the media barons, which afforded the station owner, whose life's investment is at risk, no chance to introduce evidence of meritoriousness to be weighed against his candidly admitted misconduct, which discriminatorily imposed a sanction of the greatest punitive magnitude, and which failed to explain the F.C.C.'s disparate treatment of the media barons and of the mass of competing broadcasters.

The case furnished the reviewing court below with an opportunity to correct a long-standing, arbitrary and capricious pattern of unconscionable discrimination -- a pattern which has persisted despite a number of reversals and admonitions.

While treating harshly the petty misconduct of local broadcasters, the F.C.C. has failed to enforce its regulatory mandate against misconduct nationwide in scope and fundamental to the public interest.

The F.C.C. has summarily and severely penalized licensees who have committed lesser offenses, while assessing penalties leniently, if at all, against the more powerful group of media barons which commits acts that mislead or otherwise injure vast audiences. In so doing, it has engaged in systematic discriminatory enforcement of the most classic kind. See Yick Wo v. Hopkins, 118 U.S. 356 (1886). The municipal ordinance in that case, which prohibited the operation of laundries in wooden buildings, was held unconstitutional, in part because the offense was characteristically committed by Chinese immigrants.

We do not contend that the discrimination practiced by the F.C.C. is comparably conscious and intentional; nor, of course, is racial discrimination involved. We do contend that the F.C.C.'s systematic bias in favor of the media barons is contrary to sound administration, contrary to rational regulation, and contrary to law which includes its own governing precedent. No media baron has lost its license or has otherwise been subjected to effective regulatory restraint, despite acts of great illegality and damage to the nation-wide public interest.

This Court should now seize the opportunity missed by the Court of Appeals: to restore the vitality of one of the keystone policies of the Communications Act of 1934 by ending forty years of

unconstitutional and illegal discrimination against the great mass of small broadcasters. The purposes of the Act can only be frustrated, and the public will only suffer, if the F.C.C. continues to deny even-handed treatment to those local broadcasters. Their competitive and innovative dynamism is essential if the potential of the coming years of ever-increasing broadcasting possibilities (e.g., great choice of programming through reception from satellites) is to be realized. The existing one-sided policies and practices of the F.C.C., if not redirected, will continue to encourage increasing domination of the airwaves-and of the audiences-by the media barons.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted

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August 28, 1979

APPENDIX A

Constitutional, Statutory and Regulatory Provisions Involved

CONSTITUTION OF THE UNITED STATES

Amendment V

"No person shall be... deprived of life, liberty or property, without due process of law...."

UNITED STATES CODE, TITLE 5

"§706. Scope of Review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall ---

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law...."

UNITED STATES CODE, TITLE 47

"§307. Licenses....Renewal. (d)....Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby....."

"§309. Application for License -- Considerations in Granting Application. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

....

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally...."

CODE OF FEDERAL REGULATIONS, TITLE 47

"§73.1205. Fraudulent Billing Practices. (a) No licensee of a standard, FM, or television broadcast station shall knowingly issue or knowingly cause to be issued to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber, or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or which substantially and/or materially misrepresents the time of day

at which it was broadcast, or which misrepresents the date on which it was broadcast.

(b) Where a licensee and any program supplier have entered into a contract or other agreement obligating the licensee to supply any document providing specified information concerning the broadcast of the program or program matter supplied, including noncommercial matter, the licensee shall not knowingly issue such a document containing information required by the contract or agreement that is false.

(c) A licensee shall be deemed to have violated this section if it fails to exercise reasonable diligence to see that its agents and employees do not issue documents containing the false information specified in paragraphs (a) and (b) above."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2009 September Term, 1978

White Mountain Broadcasting Co., Inc.,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Leventhal and Robinson, Circuit Judges; and Greene*, Judge, United States District Court for the District of Columbia

O R D E R

Upon consideration of appellant's petition for rehearing, it is

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

United States Court of Appeals
for the District of Columbia

FILED: May 30, 1978

GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2009

WHITE MOUNTAIN BROADCASTING CO., INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal From an Order of the
Federal Communications Commission

Argued October 3, 1978

Decided April 9, 1979

Jerome S. Boros with whom *Alan B. Kaufman* was on the brief for appellant.

Thomas R. King, Jr., counsel for the Federal Communications Commission, argued for the appellee.

Robert R. Bruce, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Julian R. Rush, Jr.*, *Counsel*, were on the brief for the appellee.

Werner K. Hartenberger, also entered an appearance for the appellee.

Before LEVENTHAL and ROBINSON, *Circuit Judges* and HAROLD H. GREENE,* *United States District Court Judge* for the District of Columbia.

Opinion for the Court filed by *District Judge* GREENE.

HAROLD H. GREENE, *District Judge*: This is an appeal pursuant to section 402(b) of the Communications Act of 1934, 47 U.S.C. § 402(b), from a decision of the Federal Communications Commission denying the application of appellant, White Mountain Broadcasting Co., for a renewal of its license for two radio stations in Berlin, New Hampshire.[1] *White Mountain Broadcasting Inc.*, 60 F.C.C. 2d 342 (July 12, 1976), *recon. denied*, 61 F.C.C. 2d 472 (October 12, 1976). The Commission's action was based upon a finding that appellant had engaged in double or fraudulent billing, with the knowing participation of one Robert Powell—its president, treasurer, director and sole shareholder. The issue to be decided is whether the Commission improperly failed to distinguish its action here from contrary results reached in what are claimed to be similar cases. For the reasons stated below, we hold that it did not.

I

Double billing is the "furnishing of false information concerning broadcast advertising to any party contributing to the payment of such advertising, the purpose being to induce such party to pay more than the actual rate for the advertising." *Fraudulent Billing Practices*, 1 F.C.C. 2d 1068 (1965). The Commission has condemned this practice as "amounting to the use of broadcast facilities

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The two stations are standard broadcast station WMOV and FM station WXLQ.

for fraudulent purposes, reflect[ing] adversely on the qualifications of a licensee and, to a degree on the industry as a whole," and impacting adversely upon the public interest, convenience, and necessity which demand "reasonably ethical business practices in the industry," *Fraudulent Billing Practices*, 23 F.C.C. 2d 70, 71 (1970),[2] and it has promulgated a rule which expressly prohibits a licensee from engaging or participating in double billing.[3]

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[2] The Commission has also noted that fraudulent billing may injure competitive stations not engaging in such practices, Fraudulent Billing Practices, 1 F.C.C. 2d 1068 (1965), and may under some circumstances be used as a scheme to violate the Clayton and Robinson-Patman Acts, 15 U.S.C. § 13 et seq. Applicability of Fraudulent Billing Rule, 23 F.C.C. 2d 303 (1970).

[3] 47 C.F.R. 73.1205 provides:

"(a) No licensee of a standard, FM, or television broadcast station shall knowingly issue or knowingly cause to be issued to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber, or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or which substantially and/or materially misrepresents the time of day at which it was broadcast, or which misrepresents the date on which it was broadcast.

"(b) Where a licensee and any program supplier have entered into a contract or other agreement obligating the licensee to supply any document providing specified information concerning the broadcast of the program or program matter supplied, including noncommercial matter, the licensee shall not knowingly issue such a document containing information required by the contract or agreement that is false.

"(c) A licensee shall be deemed to have violated this section if it fails to exercise reasonable diligence to see

The record before the Commission in this case showed that White Mountain had engaged in double billing for the approximately five and one half-year period from February 1969 until August 1974. Essentially, appellant's custom was to send to its local advertisers two separate bills—one for the true cost and quantity of their advertising, and the other for an inflated amount which the local advertiser would forward to its national supplier or manufacturer as a basis for obtaining reimbursement pursuant to a cooperative advertising agreement. Although Powell became aware of this practice just after he acquired the radio stations in 1969,[4] and while at various times he considered a phase-out, he never actually took action to that end. On the contrary, he allowed new accounts to be initiated into the double billing scheme, and the practice continued until its discovery by a Commission investigation.

Powell conceded that he knew of the FCC's prohibition against double billing and he was aware of the risk that it might result in the loss of his stations' licenses; he only claimed that in view of the competitive market the elimination of double billing would have meant a loss of business.[5]

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that its agents and employees do not issue documents containing the false information specified in paragraphs (a) and (b) above."

[4] Not only had he discussed the subject on several occasions with his general managers, but he had been questioned about it by the local newspaper.

[5] Indeed, at least one other broadcast station in the Berlin, New Hampshire, locality was found to have engaged in double billing during substantially the same period; however, it, too, has been denied license renewal. An appeal from that decision is pending. See Berlin Communications, Inc., (Initial Decision) FCC 76D-48 (September 2, 1976); FCC 78-309, 42 R.R. 2d 1513 (May 9, 1978), *appeal docketed*, Berlin Communications, Inc. v. Federal Communications Commission, No. 78-2018 (D.C. Cir., filed Oct. 25, 1978). See also note 8 *infra*.

In April 1975, the Commission designated the matter for an adjudicatory hearing pursuant to section 309(e) of the Communications Act of 1934, 47 U.S.C. § 309(e). After two days of hearings and the submission of briefs and evidence, the Administrative Law Judge made findings of fraudulent conduct, knowing violations of Commission rules, and the absence of mitigating or compassionate circumstances. *See White Mountain Broadcasting Co., Inc.* (Initial Decision), FCC 76D-10 (January 29, 1976). He did not, however, recommend the denial of White Mountain's application for license renewal, but limited his sanction recommendations to the grant of a one-year renewal conditioned upon restitution of the double billing overcharges, and a forfeiture in the amount of $10,000.

On appeal, the Commission traced the history of its double billing policy [6] and reaffirmed the principle that

[6] On March 9, 1962, the Commission issued a public notice stating that it regarded the practice of double billing as reprehensible and contrary to the public interest, "and that appropriate proceedings will be instituted in all cases where evidence of double billing by licensees is found to exist." Public Notice B, Broadcast Licensees Warned Against Engaging in Double Billing, 44 F.C.C. 2828 (1962). Thereafter, when actions taken in individual cases failed to curtail the continued practice of double billing by some licensees, the Commission adopted an express rule (including an admonition to licensees to exercise reasonable diligence toward preventing their agents and employees from violating the rule) as a statement of existing policy, Fraudulent Billing Practices, 1 F.C.C. 2d 1068 (1965), and it provided illustrations of the kinds of prohibited practices. Public Notice, Applicability of Fraudulent Billing Rule, 1 F.C.C. 2d 1075 (1965). In 1970, the Commission added language to the fraudulent billing rule "to make completely clear its prohibition against outright false billing, the knowing rendition of any bill or other document which misrepresents the number of announcements run, their character, their length, or the date and time of their broadcast," Fraudulent Billing Practices, 23 F.C.C. 2d 70 (1970), again gave examples

fraudulent conduct by licensees is neither excused nor mitigated by the knowledge or acquiescence of cooperative advertisers. See *White Mountain Broadcasting, Inc.*, 60 F.C.C. 2d 342 (1976). Emphasizing the seriousness with which it viewed the violations in light of its repeated public warnings and rulemakings on double billing, the Commission concluded that the appropriate sanction was to deny White Mountain's application for renewal of the license.[7] Appellant's motion for reconsideration on the

of prohibited practices, and reemphasized that licensees must use reasonable diligence to see to it that their employees would not engage in fraudulent billing. Applicability of Fraudulent Billing Rule, 23 F.C.C. 2d 303 (1970).

[7] The Administration Law Judge had recommended lenient treatment for appellant largely because, in his view, the local advertisers who demanded double billing were far more culpable than the station-licensees, and even national manufacturers may well be aware of and similarly accept double billing. Since all of these entities are beyond the reach of Commission jurisdiction and any effective sanction, he felt it to be inappropriate to impose upon the station owners the harsh penalty of the loss of its license. The Commission itself, however, has never accepted such a view, and has repeatedly found double billing to be a fraudulent practice incompatible with the status of a broadcast licensee, regardless of whether others, not subject to the Commission's jurisdiction, may escape unscathed. The exercise of discretion with respect to appropriate sanctions is peculiarly the responsibility of the Commission—not that of the Administrative Law Judge or this court. Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 182, 186-9 (1973); Continental Broadcasting Co. v. Federal Communications Commission, 142 U.S. App. D.C. 70, 73, 439 F.2d 580, 583 (1971); Greater Boston Television Corp. v. Federal Communications Commission, 143 U.S. App. D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971); Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). Moreover, its discretion in the choice of remedies and sanctions is broad. See, *e.g.*, Federal Communications Commission v. Woko, Inc., 329 U.S. 223, 228-29 (1946); Loraine Journal Company v. Federal Communications Commission, 122 U.S. App. D.C. 126, 351 F.2d 824 (1965).

ground that Powell neither knew of nor condoned the double billing was denied as without record support. This appeal followed.

II

The principal issue before the court [8] is appellant's con-

[8] Appellants also contend that the Commission lacks authority over double billing, that only the Federal Trade Commission has such authority, and that the Federal Trade Commission has taken little, if any, action to deal with this practice with respect to others, including competing New Hampshire media. There is no merit to these contentions. The public interest standard of the Communications Act implies that the licensee be law-abiding in the operation of the station, Granik v. Federal Communications Commission, 98 U.S. App. D.C. 247, 234 F.2d 682 (1956), and the Commission may properly consider anticompetitive or fraudulent practices of its licensees. Metropolitan Television Co. v. Federal Communications Commission, 110 U.S. App. D.C. 133, 135, 289 F.2d 874, 865 (1961); Philco Corporation v. Federal Communications Commission, 110 U.S. App. D.C. 387, 391, 293 F.2d 864, 868 (1961); General Telephone Co. of Southwest v. United States, 449 F.2d 846, 861 (5th Cir. 1971); Fraudulent Billing Practices, 2 F.C.C. 2d 864 (1964). As for the alleged failure of the FTC to enforce double billing regulations against a Berlin, New Hampshire, newspaper, the record indicates that if that publication engaged in such practices at all, it did so only for a very brief period. In any event, the Federal Communications Commission is not foreclosed from exercising its public interest jurisdiction with respect to one of its licensees merely because another regulatory agency, which lacks such jurisdiction, has not attempted to use its resources in the particular area. See also, Warner-Lambert Co. v. Federal Trade Commission, 361 F. Supp. 948, 952-3 (D.D.C. 1973); Fraudulent Billing Practices, 1 F.C.C. 2d 1068, 1069 (1965). Whatever may be the culpability of those beyond the reach of the Commission—whether they be local advertisers or competing newspapers—the Commission is not to be faulted for dealing vigorously with misrepresentation among those entrusted with a public broadcasting license, or for not permitting that license to be pyramided into a money-making scheme through fraudulent means.

tention that the Commission failed in the obligation, first explicitly imposed upon it by *Melody Music, Inc.* v. *Federal Communications Commission*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965),[9] to explain its reasons for departing from prior precedents and, where it relies on factual differences with such precedents, to explain the relevance of the differences to the Commission's purposes and those of the Federal Communications Act. Specifically, appellant claims that other licensees whose conduct posed a greater threat to the public interest than the double billing practices found to exist in this case have been granted renewal, and that the Commission has failed to provide a rationale for the difference in treatment.

The Commission argues initially that since this contention was not raised at any stage of the administrative proceedings, the matter is not properly before the court. *Alianza Federal De Mercedes* v. *Federal Communications Commission*, 176 U.S. App. D.C. 253, 539 F.2d 732 (1976). However, the doctrine of exhaustion of administrative remedies is not absolute,[10] and insofar as appellant's difference-in-treatment argument is based primarily upon a determination made after the instant controversy had run its administrative course, it is appropriate for the court to consider the issue.

In *Melody Music, Inc., supra*, this court examined the Commission's decision not to renew the broadcast license of a Hollywood, Florida radio station whose sole shareholders had engaged in the deceptive practice of giving covert assistance to contestants on a network quiz show.

[9] See also, Atchison, Topeka, & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 805 (1973); Columbia Broadcasting System, Inc. v. Federal Communications Commission, 147 U.S. App. D.C. 175, 454 F.2d 1018 (1971).

[10] See, *e.g.*, McKart v. United States, 395 U.S. 185, 193 (1968); Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 322-331 (1967).

The Commission found that the prolonged deception of the viewing public was contrary to the public interest,[11] and that accordingly the station owners lacked the requisite character qualifications for a license. At the same time, although the National Broadcasting Company had participated in these quiz shows, turned its back on evidence that they might be counterfeit, and acted only when compelled to do so by outside factors, the NBC network stations had been granted license renewals without as much as a reference to the network's role in the episode.[12]

Faced with these disparate results, this court held that the Commission was required at a minimum to explain the difference between the treatment meted out to the Hollywood station and that accorded the network station license holders. We also noted that, while in other instances the FCC had granted renewals to licensees guilty of criminal violations of the antitrust laws, in the Hollywood case the agency found non-criminal conduct to be a sufficient basis for a failure to renew—a difference in treatment which was likewise held to call for an explanation in terms of its relevance to the purposes of the Federal Communications Act. Then, significantly in terms of the instant appeal, the court went on to state that, since the differences in the misconduct at issue were not "so 'obvious' as to remove the need for explanation," the case would have to be remanded to the Commission for further proceedings.[13]

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[11] The Commission also found that the shareholders had attempted to discourage initial grand jury and network investigations.

[12] See In re Applications of Nat'l. Broadcasting Co., Nos. 13085, 14091-92, 14054-56 (Initial Decision) (Nov. 20, 1963).

[13] Similarly, Judge Fahy, concurring in the remand in Melody Music, suggested that criminal violations of antitrust laws by certain licensees were "so unrelated that I would require no further explanation from the Commission in this matter." 345 F.2d at 733.

Thus, in terms of the *Melody Music* precedent, which we regard as sound and reaffirm today, the issue here is whether the differences between the conduct of White Mountain Broadcasting, whose license was not renewed, and that of others who were not denied renewals, are "so obvious as to remove the need for explanation." We hold that they are.

III

Appellant claims that the Commission's license renewal to stations owned by the Columbia Broadcasting System in *CBS, Inc.*, 69 F.C.C. 2d 1082 (1978), and the contemporaneous denial of its application for renewal, constitutes the kind of disparate treatment which calls for an explanation under *Melody Music*.[14] It thus becomes necessary to examine the facts and the Commission's actions in the CBS proceeding.

In February 1975, the CBS television network broadcast the first of a series of four tennis matches, extensively advertised as being played for $250,000 "winner-take-all." In fact, all of the participants received prize monies in various amounts depending upon their general standing and reputation as tennis professionals rather than upon their winning or losing the particular televised tourna-

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[14] Appellant also refers to the renewal of the licenses of two antitrust violators, General Electric Co., 45 F.C.C. (Part II) 1592 (1964) and Westinghouse Broadcasting Co., 44 F.C.C. (Part II) 2770 (1962). See note 13, *supra*. These matters occurred long before the present administrative proceeding involving this appellant and there is therefore no excuse for appellant's failure to raise them at the agency level. In any event, renewals notwithstanding antitrust violations not directly related to the use of broadcast facilities will not stand as a precedent for the automatic renewal of all broadcast licenses some fifteen years later, and the Commission will not be required to distinguish them every time a licensee is denied renewal.

ment.[15] After conducting its own investigation, and after giving due consideration to the so-called "Lane-Black report" (an investigation by outside counsel) and a House of Representatives subcommittee investigation, the FCC determined that "prize" references made by CBS in connection with the matches were false and misleading, and that, at a minimum, CBS officials demonstrated a pattern of negligent conduct coupled with an apparent disregard for known facts. It concluded that the network itself should be held responsible both for the conduct of its officials in connection with the deceptive programming and for the "less than candid" attitude of its president with respect to the investigation. Rather than to designate the matters for hearing, however, the Commission, by means of a letter to CBS, suggested that a short-term renewal of one or more of its stations might be an appropriate sanction, deferring final action to give the network an opportunity to provide additional information of a mitigating nature. *See CBS, Inc., Tennis Match*, 67 F.C.C. 2d 969 (1978).

Four months later, the Commission issued a statement in which it concluded that since the network as such had been candid with the staff,[16] had made full disclosure to the public in two special reports broadcast over 177 network television stations, had completely cooperated both with the FCC investigation [17] and that of the House com-

[15] For participating in the second, third, and fourth matches, Jimmy Connors received a total of $1,450,000; and for playing in the second, third, and fourth matches respectively, John Newcombe received approximately $280,000, Manuel Orantes received $250,000, and Ilie Nastase received $150,000.

[16] It again found, however, that one or more network executives had lied to Commission investigators.

[17] While the network's after-the-fact cooperation played a part in the final outcome, it was not a major factor. Moreover, the CBS cooperation and its remedial actions far exceeded both in relative scope and timeliness the feeble intentions expressed by this appellant.

mittee, and had instituted corrective measures by adopting new internal procedures designed to prevent a recurrence of the deceptive practices, only a short-time license renewal, rather than a designation for hearing for license revocation, was warranted. *CBS, Inc.*, 69 F.C.C. 2d 1082 (1978). In reaching its decision, the Commission laid heavy stress upon the fact that the case was the first involving misrepresentations to the Commission by the network, and that network management appeared to have been unaware of the consequences of such misrepresentations.[18]

In our view, the differences between that case and the misconduct involving White Mountain are so patent that the Commission was not required to refer to them specifically in its decision in the instant proceeding.[19]

The involvement of White Mountain and its controlling stockholder was not limited to a single instance of misrepresentation but consisted of a fraudulent course of conduct extending over a five and one-half year period. Their misrepresentation, unlike that of CBS, was not of conceivably debatable legality in terms of the FCC rules, for the Commission had, again and again, warned against double billing, and it had warned also—as Powell well knew—that any licensee engaging in this practice risked license revocation. Indeed, absent strong mitigating circumstances,[20] the Commission has consistently imple-

[18] The Commission made clear, however, that future misrepresentatives by network personnel would be attributed to the licensee corporation operating the network and would result in the designation of one or more of its licenses for revocation hearings.

[19] It might be said, however, that the Commission's decision in CBS, Inc. in effect identified those very differences by its reliance upon factors which are clearly not present here.

[20] In some instances, where the Commission found specific mitigating circumstances, it imposed a lesser sanction. See

mented that policy and denied renewal in double billing stituations. *E.g., United Broadcasting Co. of Florida, Inc.*, 55 F.C.C. 2d 832 (1975), *recon. denied*, 60 F.C.C. 2d 816 (1976); *Wharton Communications, Inc.*, 44 F.C.C. 2d 489 (1973); *Eastminster Broadcasting Corp.*, 58 F.C.C. 2d 24, *aff'd without opinion, Eastminster Broadcasting Corp.* v. *Federal Communications Commission*, D.C. Cir. No. 1797 (June 8, 1977).

Thus, with respect to the factors upon which *CBS, Inc.* turned—a single, relatively brief episode of wrongdoing coupled with a lack of knowledge of the applicable rules and consequences by the decision-makers—the instant case is wholly different, and the two situations can be equated only in the most superficial sense. For that reason, too, appellant's attempt to convert this case into a vehicle for demonstrating a Commission bias in favor of "media barons" and against the small, struggling radio stations falls far short of its mark. The record indicates to the contrary that, in this instance certainly, the difference in treatment had an obvious rational basis. In such circumstances, a remand to the Commission for further explanation of its decision would constitute an unnecessary and useless act, and the decision of the Commission is therefore

Affirmed.

Blackstone Broadcasting Corp., 52 F.C.C. 2d 1106, 1111-13 (1975); Bluegrass Broadcasting Co., Inc., 43 F.C.C. 2d 990 (1973).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of	)	
	)	
WHITE MOUNTAIN	)	
BROADCASTING CO., INC.	)	DOCKET NO. 20456
(WMOU and WXLQ(FM))	)	File Nos.
Berlin, New Hampshire	)	BR-1329
	)	BRH-725
For Renewal of Licenses	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1976;

Released: October 12, 1976

By the Commission: Commissioner Lee abstaining from voting; Commissioners Washburn, Fogarty and White not participating.

1. By a Decision, F.C.C. 76-608, released July 12, 1976, the Commission denied the applications of White Mountain Broadcasting Co., Inc. (White Mountain) for renewal of its licenses for stations WMOU and WXLQ(FM) both at Berlin, New

Hampshire. Now before the Commission is a petition filed by White Mountain on August 11, 1976 requesting reconsideration of that Decision. The Broadcast Bureau filed an opposition to the petition on August 23, 1976, and White Mountain filed a reply on August 26, 1976.

2. In its petition, the licensee asserts that its sole stockholder, Robert R. Powell, did not knowingly engage in any fraudulent billing scheme and that the Commission in reaching a contrary conclusion had not considered all pertinent evidence of record. It further argues that denial of renewal constitutes a penalty more severe than that imposed upon other renewal applicants whose derelictions were similar. These contentions are supported neither by the evidence of record nor by case precedent. Between

February, 1969 and August, 1974, the licensee engaged in fraudulent billing practices and numerous affidavits were issued which misrepresented the cost and quantity of the advertising broadcast on WMOU and WXLQ. In 1973 and 1974 the overcharges were in excess of $7,800.00 and during the 1969-1972 period the overcharges were at least twice that amount. In addition, $1,298.00 of the amount received from a cooperative advertiser during the latter part of 1969 were turned over to the local advertiser pursuant to a rebate arrangement. At least three times between February, 1969 and April, 1971, Mr. Powell was informed by the stations' general manager, Robert T. Dale, that the stations were engaged in double billing with respect to some of the local advertising accounts. Mr.

Powell was also advised of the stations' double billing practices during the latter part of 1969 or the early part of 1972 by John T. Gallus who succeeded Mr. Dale as general manager. On the basis of the foregoing and other substantial evidence of record concerning Mr. Powell's participation in the fraudulent billing practices at the stations (Initial Decision, Findings, paras. 7, 11-15), the presiding judge found that "Mr. Powell was aware that WMOU-WXLQ were engaging in fraudulent billing; that he was aware that the Commission's Rules prohibited such fraudulent activities; and that he nevertheless failed to end false billing at the stations" (Initial Decision, Conclusions, para. 23). The judge further found that "Mr. Powell knowingly and repeatedly allowed fraudulent billing

practices to continue with numerous (22) co-op advertisers over a prolonged period of time" (Initial Decision, Conclusions, para. 26).

3. In large part the findings set forth above were based on facts stipulated by the licensee. Furthermore, no exceptions were filed by the licensee to any of the Administrative Law Judge's findings and those findings are not now subject to challenge. See Section 1.277 of the Commission's Rules. White Mountain's contention that Mr. Powell "did not at any time knowingly engage in any fraudulent billing scheme" (Petition, para. 4),* is so completely without record

*The affidavits submitted by White Mountain with its petition in an effort to bolster its case must be rejected. Colorado Radio Corp. v. F.C.C. 73 U.S. App. D. C. 225, 117 F.2d 24 (1941). In any event the affidavits contain nothing of decisional significance.

support as to require no further discussion or consideration. Likewise, White Mountain's contention that case precedent does not support the Commission's determination to deny the license renewal applications is without merit and must be rejected. The authorities discussed in our Decision clearly support denial of renewal in view of the nature, extent, and duration of the fraudulent billing practices established by this record. See also, Monroe Broadcasters, Inc., F.C.C. 76-711, released August 13, 1976. No comparable factual situation was presented in Bluegrass Broadcasting Co., Inc., (43 F.C.C. 2d 990), Blackstone Broadcasting Corp. (52 F.C.C. 2d 1106), or the other cases relied upon by the licensee.

4. Other arguments advanced by White Mountain in its petition were

previously considered and rejected by the Commission in its Decision and no purpose would be served by repeating our discussion of them here. See United Broadcasting Company of Florida, Inc., F.C.C. 76-709, released August 13, 1976. Suffice it to say that we have given careful consideration to all contentions advanced but we find no reason to depart from our determination that denail of the license renewal applications is required in the public interest.

5. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by White Mountain Broadcasting Co., Inc. on August 11, 1976 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of	)	
	)	
WHITE MOUNTAIN	)	DOCKET NO. 20456
BROADCASTING CO., INC.	)	File Nos. BR-1329
(WMOU and WXLQ (FM))	)	BRH-725
Berlin, New Hampshire	)	
	)	
For Renewal of Licenses	)	

Appearances

Mark E. Fields, Esq., on behalf of White Mountain Broadcasting Co., Inc., and Joseph Chachkin, Esq., and Barbara A. Kreisman, Esq., on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

Decision

Adopted: June 29, 1976;

Released: July 12, 1976

By Commissioner Hooks for the Commission: Commissioners Lee and Washburn not participating.

1. This proceeding involves the applications of White Mountain Broadcasting Co., Inc. (White Mountain) for renewal of licenses of its standard broadcast station WMOU and its FM station WXLQ, both at Berlin, New Hampshire. By Order and Notice of Apparent Liability, F.C.C. 75-463, released May 8, 1975 (40 Fed. Reg. 21772, published May 19, 1975), the Commission designated the applications for hearing on the following issues:*

(a) To determine whether the applicant engaged in fraudulent

*The Review Board added a meritorious programming issue but provided that the evidence adduced thereunder could not be used in mitigation of adverse findings under the fraudulent billing issue. The Review Board also limited the showing to evidence of White Mountain's performance before it learned that its licenses were in jeopardy.

billing practices in the operation of Stations WMOU and WXLQ(FM), in violation of Section 73.1205 of the Commission's Rules;

(b) To determine whether the licensee has failed to maintain adequate program logs for Station WXLQ(FM) in violation of Sections 73.281 and 73.282 of the Rules;

(c) To determine whether the licensee has failed to retain program logs in violation of Sections 73.115 and 73.285 of the Rules; and

(d) To determine, in the light of the evidence adduced under the preceding issues, whether the applicant possesses the requisite qualifications to be or to remain a licensee of the

Commission, and whether a grant of the captioned applications would serve the public interest, convenience and necessity.

The designation order further provided that if the hearing record did not warrant denial of the renewal applications a determination should be made whether a forfeiture in the sum of $10,000 or some lesser amount should be issued pursuant to Section 503 of the Communications Act of 1934, as amended, for the rule violations charged therein.

2. In an Initial Decision, F.C.C. 76D-10, released February 5, 1976, Administrative Law Judge (A.L.J.) James F. Tierney concluded that the licensee had engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and that it had committed numerous violations of the Rules

specified in issues (b) and (c) set forth above. Finding, however, that a sanction less than denial of renewal was justified, the A.L.J. recommended that White Mountain's licenses be renewed for a term of one year upon the condition precedent that the licensee make full restitution for the overcharges made pursuant to its fraudulent billings. The A.L.J. also recommended a forfeiture in the sum of $10,000.00. The Broadcast Bureau filed exceptions to the Initial Decision and a brief in support of its exceptions urging that the renewal applications be denied. White Mountain filed no exceptions but it did file a reply brief requesting that the Initial Decision be affirmed. We heard oral argument on June 15, 1976.*

*Commissioners Lee and Washburn did not hear oral argument and are not participating.

3. The A.L.J.'s findings of fact are predicated in large part upon the stipulations of the parties and they are not in dispute. Likewise, there is no dispute as to the A.L.J.'s conclusions that the licensee violated Section 73.1205 and the other rules enumerated in the designated issues. Consequently, these findings and conclusions are affirmed except as modified in this Decision and in our rulings on exceptions contained in the Appendix. However, we disagree with the A.L.J.'s ultimate conclusion that while Mountain's licenses should be renewed since such a conclusion in the circumstance of this case is inconsistent with Commission policy and prior Commission decisions. As the undisputed facts concerning White Mountain's fraudulent billing practices clearly demonstrate, this is one of the most egregious cases

involving Rule 73.1205 violations which has come before this Commission.

4. Robert R. Powell is the president, treasurer, director, and the sole stockholder of White Mountain which acquired the AM and FM licenses by assignment in February, 1969. Shortly after the stations were acquired, the then general manager, Robert T. Dale, informed Mr. Powell that the stations were double billing* certain local advertisers who

*The principal ingredient of "double billing" is "the furnishing of false information concerning broadcast advertising to any party contributing to the payment of such advertising, the purpose being to induce such party to pay more than the actual rate for the advertising." Fraudulent Billing Practices, 1 F.C.C.2d 1068 (1965). In most of the instances involved in this proceeding, the licensee sent two bills to the local account, one for the true quantity and cost of the advertising broadcast and the other for an inflated amount which was sent to the manufacturer or supplier as the basis for obtaining reimbursement. The terms "fraudulent billing" and "double billing" are used interchangeably in this Decision.

had cooperative advertising agreements with manufacturers or suppliers providing for payment, or for credit of a percentage of the cost, of the advertising. Powell and Dale had at least two additional conversations on the subject between February, 1969 and April, 1971 when Dale's employment as general manager of the station was terminated. Thereafter, John T. Gallus who previously had been employed at the stations in other capacities was promoted to the position of general manager. In the course of several conversations with Mr. Gallus during late 1971 or early 1972, Mr. Powell was again informed that the stations were continuing to double bill certain accounts. Mr. Powell concedes that throughout the period of his stewardship of WMOU-WXLQ he knew that fraudulent billing arrangements constituted a violation of the Commission's

rules. Nevertheless, he took no affirmative action to bring these prohibited activities to a halt. He made no further inquiries of Mr. Gallus to determine whether the practice was being "phased out" as he claims he directed Mr. Gallus to do. He undertook no examination of the stations' books and records which would have revealed that advertisers were continuing to be double billed. On the contrary, he participated in the fraudulent billing practices by the execution of fraudulent affidavits some of which were blank when signed, on a regular monthly basis which misrepresented both the cost and quantity of the advertising broadcast by the stations. Moreover, these illegal practices continued at the stations at least until the Commission conducted its field investigation in

August, 1974.

5. Since the Initial Decision contains a detailed and accurate statement of the number and content of the affidavits executed by Mr. Powell and the amounts of the overcharges, a brief summary will suffice here to demonstrate the very serious nature of the violations of Section 73.1205 established by this record. Between January, 1973 and August, 1974, Mr. Powell executed numerous affidavits to fourteen local advertisers which misrepresented the cost and quantity of advertising broadcast on WMOU and WXLQ. The total amount of the overcharges involved in these accounts during the stated period was in excess of $7800.00. False affidavits were also submitted to these fourteen advertisers between February, 1969 and December 31, 1972 but the exact amount of the overcharges could not be

ascertained because White Mountain was unable to locate copies of the pertinent affidavits. During the period from February, 1969 to December, 1971 eight additional local advertisers were issued fraudulent affidavits but again the exact amount of the overcharges cannot be ascertained for the same reason. On the basis of the evidence adduced at the hearing, however, the ALJ concluded that the overcharges during the 1969-1972 period were at least twice as much as the overcharges in 1973 and 1974, and White Mountain does not challenge this conclusion. The record further reflects that White Mountain had a rebate arrangement with one of its accounts whereby false affidavits were submitted either directly to the cooperative advertiser or through the local account and, when payment was received from the supplier, White

Mountain would rebate half the amount to the account. These rebates, which occurred during July, August, October, and November, 1969 totaled $1,298.20. Some of the fraudulent billing arrangements with certain accounts were in existence when White Mountain acquired the stations in 1969 and others were thereafter initiated at the instigation of the local merchants. However, White Mountain initiated the fraudulent billing arrangements with at least seven accounts.

6. Mr. Powell could hardly have failed to realize the seriousness of his misconduct in view of the numerous warnings issued by the Commission on the subject of fraudulent billing. See Public Notice, F.C.C. 62-272, released March 9, 1962; Fraudulent Billing Practices, 1 F.C.C.2d 1068 (1965); In re Applicability of Fraudulent Billing Rule, 1 F.C.C.2d

1075 (1965); Fraudulent Billing Practices, 23 F.C.C.2d 70 (1970); In re Application of Fraudulent Billing Rule, 23 F.C.C.2d 303 (1970). When it appeared that past sanctions in the form of forfeitures had failed to accomplish the desired result of causing licensees to discontinue this practice, the Commission issued another Public Notice (38 F.C.C.2d 1051) on December 7, 1972 emphasizing the seriousness with which it viewed violations of the fraudulent billing rule "because it involves participation by the licensee in a fraud and raises serious questions as to his qualifications to remain a licensee." The Commission also advised broadcasters that such violations would be considered as a basis for denying applications for renewal of licenses. Despite these warnings and the information he received

as early as 1969 that stations WMOU and WXLQ were engaged in practices prohibited by Section 73.1205, Mr. Powell, the licensee's sole stockholder, continued to sign affidavits containing false information as to the cost and quantity of the advertising broadcast by the stations until at least August, 1974; and these fraudulent affidavits resulted in overcharges to manufacturers and suppliers of the local merchants pursuant to their cooperative advertising agreements amounting to many thousands of dollars.

7. On the basis of the stipulations and other evidence adduced at the hearing, the A.L.J. concluded not only that the licensee had violated the rules specified in the designation order but that the practices established by this record were "most emphatically, reprehensible." He

further held that there was a failure in great dimension of mitigating or even compassionate circumstances." We agree with these conclusions. However, in light of the presiding judge's findings and conclusions, his ultimate determination to grant even a short term renewal is contrary to Commission policy and is inconsistent with controlling Commission decisions where renewal was denied for fraudulent billing which did not reach the nature, extent and duration of the misconduct established by this record.

8. In United Broadcasting Co. of Florida, Inc., 55 F.C.C.2d 832 (1975), we denied renewal where fraudulent billing was the only misconduct at issue and the improper activities were carried out with but one local advertising account, for a period of approximately

sixteen months. Although the record in that proceeding was insufficient to establish that "any United employee or principal consciously and directly participated" in the advertiser's scheme (55 F.C.C.2d at 837) we nevertheless concluded that denial of renewal was required because of the licensee's failure to heed our repeated warnings concerning the seriousness with which we viewed fraudulent billing by taking positive, affirmative and effective steps to guard against such abuses, particularly after indications of possible violations were brought to its attention. In the proceeding under consideration, White Mountain's principal not only knew that the stations were engaging in fraudulent billing practices but he participated in such practices by executing numerous

affidavits containing false information concerning the quantity and cost of the advertising broadcast.

9. Our recent decision in Eastminster Broadcasting Corporation, F.C.C. 76-156, released February 25, 1976 likewise is applicable here. That case involved misconduct in addition to the fraudulent billing. However, we noted in our decision that the fraudulent billing was a matter of primary importance and we held the record evidence as to these practices alone necessitated a finding that renewal of license would not be in the public interest. Again, neither the duration or seriousness of the misconduct shown equalled that of White Mountain. See also Wharton Communications, Inc., 44 F.C.C.2d 489 (1973) where the Commission held that the licensee's

misconduct, including its fraudulent bill practices over a seven year period, "transcend the pale of pardonable transgression" which justified denial of its renewal application. We did grant renewals in Bluegrass Broadcasting Co., Inc., 43 F.C.C.2d 990 (1972) and Blackstone Broadcasting Co., 52 F.C.C.2d 1106 (1975). However, the circumstances which justified such action in those cases are absent here and the cases are factually distinguishable. Furthermore, the ALJ did not hold and White Mountain does not claim that either case is applicable here.

10. The A.L.J. recognized the applicability of United and Wharton* to the factual situation herein presented but he concluded that a sanction less than denial

*Our decision in Eastminster was adopted after the release of his Initial Decision.

of renewal was justified despite these decisions because: (a) the local advertisers who benefit from the double billing arrangements are subjected to no sanction; (b) the manufacturers and suppliers who were seemingly wronged by the arrangements have not complained; and (c) the practice "is going on all over the place." Similar contentions previously have been advanced as mitigating circumstances in double billing cases and they have been rejected by the Commission. In United Broadcasting Co. of Florida, Inc., 55 F.C.C.2d at 836 we held that "licensee participation in such billing schemes will not be tolerated and will not be mitigated by lax practices among cooperative advertisers." In answer to a contention in Wharton Communications, Inc. that none of the presumed victims of the fraud had objected, we first pointed

out that the record contained no evidence that the cooperative advertisers knew of the fraud. We further held that "In any event, our Rules specifically prohibit the use of licensed facilities for fraudulent purposes, and the seriousness of these violations would not be mitigated by the failure of the cooperative advertisers to object to the practices or to seek redress of their grievances." (44 F.C.C.2d at 493). Likewise, in the case now before us, there is no significant evidence that the cooperative advertisers knew of the fraudulent billing practices or that they would have acquiesced in the practices had they known; and we also adhere to the view that fraudulent conduct by licensees is not mitigated by the knowledge or acquiescence on the part of the cooperative advertisers. To the same effect see

Fraudulent Billing Practices, 1 F.C.C.2d 1075 (1975). As for the contention that participation by others in fraudulent billing schemes is a mitigating circumstances the simple answer is that, to the extent that such fraudulent schemes come within the regulatory jurisdiction of this Commission, we are determined to make every effort to see to it that the fraudulent practices are stopped. As we held in Fraudulent Billing Practices, 1 F.C.C.2d 1068 at 1069:

> We are not concerned here with a practice engaged in outside of the radio field by broadcast licensees. We are here concerned with this one aspect of the operation of the licensed facilities. The public interest standard of the Communications Act implies a requirement that the licensee be law abiding in the operation of his station, Federal Communications Commission v. American American Broadcasting Co., 347 U.S. 284, 290 (1954); Granik v. F.C.C., 234 F.2d 682 (1956). The prohibition of a particular fraudulent practice as being inconsistent with operation in the public interest is not the

> sort of "supervision" of a licensee's business practices and policies which Congress withheld when it determined that broadcast stations should operate in a competitive market rather than under a form of common carrier or public utility regulation. Furthermore, the practice of "double billing" has an impact beyond the particular parties concerned. The use of this concededly improper and illegal practice affects adversely the operation of competitive stations not engaging therein, and also is clearly a matter of proper Commission concern. See Federal Trade Commission v. Keppel & Bro., 291 U.S. 304.

The A.L.J. manifestly was in error when he ignored these controlling decisions and pronouncements of the Commission and the reasons which he gave for imposing a sanction less than denial must be rejected now as they have been in the past.

11. A further mitigating circumstance advanced by White Mountain as justifying the short term renewal is its payment of restitution to a number of cooperative advertisers. In the first

place the condition precedent imposed by the A.L.J. to a short term renewal, i.e., that the licensee make "full restitution of the amount unjustly acquired - to the penny - ..." cannot be and was not fulfilled. It could not be fulfilled because copies of the affidavits executed by Mr. Powell between 1969 and the end of 1972 are unavailable and the exact amount of the overpayments during that period cannot be ascertained. The condition was not fulfilled since complete restitution of the overcharges was not made. The undisputed facts of record establish that the overcharges during 1973 and 1974 were in excess of $7,800.00 and while the exact amount of the overcharges between 1969 and December 31, 1972 are unknown, they were at least twice that amount. In addition one cooperative advertiser was

overcharged about $1,298.00 pursuant to the licensee's rebate agreement with a local account. However, according to White Mountain's submissions on March 11, May 7, and May 13, 1976, restitution in cash and in the form of advertising time was made only in the amount of approximately $8,000.00. Thus the restitution made falls far short of the full restitution specified by the A.L.J. Moreover, restitution may not be relied upon as a mitigating factor in the circumstances of this case. The situation here is not one where the licensee was unaware of the unlawful billing practices and its failure to learn of the violations resulted from the unexpected breakdown of procedures at the station to guard against such violations. On the contrary, the sole stockholder of the licensee corporation

knew that the stations were engaging in practices prohibited by Section 73.1205 and he participated in the prohibited practices by executing the false affidavits which were an essential ingredient of the fraudulent schemes. Of substantial significance also is the fact that the offer by the licensee to make restitution was not a voluntary act prompted by a desire to rectify a wrong but was made only after the issuance of the Initial Decision when it was forcefully brought to the attention of White Mountain that its licenses were in serious jeopardy. No significant equities accrue to White Mountain for this belated offer since the Commission has consistently taken the position that remedial or corrective action initiated after a licensee learns that its license is in jeopardy

merits little or no consideration. Jefferson Radio Co., 35 F.C.C. 673 (1963). See also: Eleven Ten Broadcasting Corp., 32 F.C.C. 706 (1962), affirmed sub nom. Immaculate Conception Church of Los Angeles et al. v. F.C.C., 116 U.S. App. D.C. 73, 320 F.2d 795 (1963) cert. denied 375 U.S. 904; United States Transdynamics Corp., 16 F.C.C.2d 623 (1969).

12. In view of the nature, extent and duration of the double billing by White Mountain, we conclude that the violations of Section 73.1205, in and of themselves, require the denial of the renewal applications now before us. However, the licensee also admitted the failure to maintain adequate program logs for its FM station, WXLQ in violation of Sections 73.281 and 73.282 of the Rules,

and the failure to retain program logs in violation of Sections 115 and 73.285 of the Rules. While we would not deny the renewal applications by reason of these rule violations, they do indicate a casual attitude on White Mountain's part toward its responsibilities as a licensee which serves to reinforce our view that the public interest would not be served by a renewal of the AM and FM station licenses.

13. ACCORDINGLY, IT IS ORDERED, That the above captioned applications of White Mountain Broadcasting Co., Inc. for renewal of licenses of its standard broadcast station WMOU and its FM station WXLQ, both at Berlin, New Hampshire ARE DENIED.

14. IT IS FURTHER ORDERED, That White Mountain Broadcasting Co., Inc. IS AUTHORIZED to continue to operate the

said stations until 12:01 a.m., October 1, 1976, to enable the licensee to conclude the stations' affairs: PROVIDED, HOWEVER, that if the licensee seeks judicial review of our Decision, it is authorized to continue to operate the stations until thirty (30) days after the court which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

APPENDIX

Rulings on Exceptions of the Broadcast Bureau

Exceptions	Ruling
1, 2, 4, 5, 6, 8, 9, 10	Granted for the reasons set forth in the Decision.
3	Granted. The ALJ found that White Mountain had initiated the fraudulent billing practices with several accounts and that finding is supported by substantial evidence of record.
7	Granted. No significant evidence of record supports the ALJ's findings concerning the extent of violations by others and, in any event, the matter is not of decisional significance.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 76D-10

60444

In re Applications of	)	DOCKET NO. 20456
	)	
WHITE MOUNTAIN BROADCASTING, CO., INC.	)	File Nos. BR-1329 BRH-725
Berlin, New Hampshire	)	
	)	
For Renewal of Licenses	)	

Appearances

Mark E. Fields, Esq., on behalf of White Mountain Broadcasting, Co., Inc., and Joseph Chachkin, Esq., and Barbara A. Kreisman, Esq., on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JAMES F. TIERNEY
Issued:January 29, 1976; Released:February 5, 1976

Preliminary Statement

1. By Order and Notice of Apparent Liability, 40 Fed. Reg. 21772, published May 19, 1975, the Commission designated for hearing on the following issues the applications of White Mountain Broadcasting

Co., Inc. (White Mountain) for renewal of the licenses for AM Station WMOU and FM Station WXLQ, Berlin, New Hampshire:

(a) To determine whether the applicant engaged in fraudulent billing practices in the operation of Stations WMOU and WXLQ(FM), in violation of Section 73.1205 of the Commissions Rules;

(b) To determine whether the licensee has failed to maintain adequate program logs for Station WXLQ(FM) in violation of Sections 73.281 and 73.282 of the Rules;

(c) To determine whether the licensee has failed to

retain program logs in violation of Sections 73.115 and 73.285 of the Rules; and

(d) To determine, in light of the evidence adduced under the preceding issues, whether the applicant possesses the requisite qualifications to be or to remain a licensee of the Commission, and whether a grant of the captioned applications would serve the public interest, convenience and necessity.

2. The designation Order directed that the Chief, Broadcast Bureau, serve upon the applicant within 30 days a Bill of Particulars setting forth the basis

for adoption of hearing issue (a). The Bill of Particulars was served on the applicant on May 12, 1975. The designation Order also constituted a Notice of Apparent Liability in the amount of $10,000 or some lesser amount for violation of the Communications Act of 1934, as amended, and the Commission's Rules. It was stressed, however, that inclusion of the Notice is not to be taken as in any way indicating what the initial or final disposition of the case should be.

3. By Memorandum Opinion and Order, 54 F.C.C.2d 299, released July 16, 1975, the Review Board added the following issue in this proceeding:

> To determine whether the programming of Stations WMOU and WXLQ(FM) has been meritorious, particularly with regard to public service programs.

The Review Board stated, however, that any evidence adduced under this issue may not be used to mitigate adverse findings under issue (a), and that a showing of meritorious programming must be limited to White Mountain's performance before it learned that its license was in jeopardy.

4. A prehearing conference was held at the Commission's offices in Washington, D. C. on June 17, 1975. The hearing date established at that conference was advanced by Order, FCC 75M-1378, released August 8, 1975. Hearing sessions were held in Berlin, New Hampshire on September 9 and 10, 1975. The record in this proceeding was closed on September 10, 1975. While both parties submitted proposed findings and conclusions as well as reply findings, because the Bureau's findings

more faithfully reflect the record evidence, in the main, except for editorial and language preference, they will be adopted.

5. For the reasons hereinafter, the applications of White Mountain Broadcasting Company, Inc., for renewal of Stations WMOU and WXLQ(FM) SHALL BE GRANTED FOR A LIMITED PERIOD CONTINGENT UPON OTHER SANCTIONS.

Findings of Fact

6. WMOU (1230 kHz, 1000 W-D, 250 W-N) and WXLQ (103.7 mHz, 10kW) were acquired by White Mountain by assignment of license approved by the Commission on February 11, 1969, and consummated effective February 20, 1969. The stations operate with the same facilities, personnel and management. All of White

Mountain's issued and outstanding stock has been held by Robert R. Powell since the corporation's inception. White Mountain's officers and directors are: Robert R. Powell - President, Treasurer and Director; Gladys E. Powell, Powell's wife, - Secretary and Director; and Robert R. Powell, Jr., Assistant Secretary and Director. The aforesaid persons have served in these positions since White Mountain's formation.

Fraudulent Billing

7. The licensee-applicant admitted by formal stipulation that it issued affidavits during a five year period (1969-1974) which misrepresented both the cost and quantity of advertising broadcast on WMOU and WXLQ. The affidavits

were signed by Mr. Powell, 1/ the principal, and notarized by Mr. John T. Gallus 2/. Mr. Robert T. Dale 3/ and later Mr. Gallus gave the instructions to the station bookkeeper who prepared the affidavits as to what information was to be included in them 4/. These affidavits were sent by U.S. mail to merchants in

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1/ Mr. Powell would sign the affidavits in blank on occasion.

2/ Mr. John T. Gallus was employed by WMOU-WXLQ from February 1969 to April 1971 in the capacities of program director, bookkeeper and salesman. In April, 1971, he was promoted to the position of general manager.

3/ Mr. Dale had been employed as General Manager by the previous owner of the stations. Under Mr. Powell's ownership, his position was more of a sales manager and in fact his responsibilities were strictly in the sales area.

4/ Occasionally, a client would call the bookkeeper directly with instructions as to what to include in a fraudulent affidavit.

the Berlin, New Hampshire 5/ area who had purchased advertising on WMOU and WXLQ, and had been billed for this advertising by separate invoices which showed the correct number and cost of the commercial announcements broadcast by the stations. The admittedly false affidavits, in most cases, were forwarded by the merchants, pursuant to cooperative advertising agreements, to manufacturers for payment or credit of a percentage of the cost of the advertising shown on the affidavits. File copies of these affidavits were retained by White Mountain.

8. The affidavits issued on various dates during the period from January, 1973

5/ There may have been some cases in which affidavits were sent directly to advertising agencies.

to August, 1974, which were involved in the transactions described in the paragraph above, are detailed in the following 6/.

6/ White Mountain initiated the fraudulent billing arrangements in connection with the following accounts: Berlin Furniture Mart, Berlin Tire, Dennis Sport Shop, Gorham Hardware, Raymound's Jewelry, Hallmark Hall of Greetings, Automotive Sales. Representatives of the following accounts initiated fraudulent billing arrangements with WMOU-WXLQ: Berlin Chrysler-Plymouth-Datsun, Renaud Honda, Western Auto, Louis Catello and Son. Fraudulent billing arrangements were in existence with the following accounts at the time Mr. Powell acquired the stations: Costello Tire Co., Day's Jewelry and Appliance Store, Pennock Appliances, Top Furniture. Mr. Dale could not recall the circumstances under which fraudulent billing arrangements begain in connection with the following accounts: Lee's Studio and Camera Shop, Norman's TV Sales and Service, TV Lab, Langis Shoe Store, Robichaud Garage, Don's Sports Shop Princess Theatre.

1. Account: Berlin Chrysler - Plymouth - Datsun

Affidavit Date (and No. Issued)	Amount Stated in Corresponding Invoice	Amount Stated in Affidavit	Difference
1-1-73 (3)	$90.00	$250.00	$160.00
2-1-73 (3)	90.00	250.00	160.00
3-1-73 (3)	90.00	250.00	160.00
4-1-73 (3)	90.00	250.00	160.00
5-1-73 (3)	90.00	250.00	160.00
6-1-73 (3)	90.00	250.00	160.00
7-1-73 (3)	90.00	250.00	160.00
8-1-73 (3)	90.00	250.00	160.00
9-1-73 (3)	90.00	250.00	160.00
10-1-73 (3)	90.00	250.00	160.00
11-1-73 (3)	90.00	250.00	160.00
12-1-73 (3)	90.00	250.00	160.00
1-1-74 (3)	90.00	250.00	160.00
2-1-74 (3)	90.00	250.00	160.00
3-1-74 (3)	45.00	250.00	205.00

Affidavits issued for: Chrysler, Plymouth, Datsun

2. Account: Berlin Furniture Mart

Affidavit Date (and No. Issued)	Amount Stated in Corresponding Invoice	Amount Stated in Affidavit	Difference
1-1-73 (3)	$43.00	$311.25	$268.25
12-1-73 (1)	65.00	97.50	32.50
1-2-74 (3)	65.00	325.00	260.00

Affidavit issued for: Spring Air, Maytag and Kelvinator

Affidavit Date (and No. Issued)	Amount Stated in Correspond-ing Invoice	Amount Stated in Affidavit	Difference
3. Account: Berlin Tire Co.			
9-1-73 (1)	$ 70.00	$140.00	$ 70.00
Affidavit issued for: Goodyear			
4. Account: Leon Costello Tire Co.:			
1-2-73 (1)	$119.15	$233.60	$114.45
5-1-73 (1)	148.00	259.20	111.20
6-1-73 (1)	152.35	297.60	145.25
7-1-73 (1)	147.50	288.00	140.50
8-1-73 (1)	152.85	297.00	144.15
9-1-73 (1)	152.85	297.00	144.15
10-1-73 (1)	148.00	288.00	140.00
11-1-73 (1)	148.00 7/	297.00	144.65
12-1-73 (1)	147.50	288.00	140.50
1-2-74 (1)	152.85	297.60	144.75
2-1-74 (1)	19.40	38.40	19.00
6-1-74 (1)	15.00	198.40	183.40
7-1-74 (1)	69.30	192.00	122.70
8-1-74 (1)	88.20	147.20	59.00
Affidavits issued for: Firestone			

7/ No invoice could be found. The stations' accounts receivables entry established that Costello was charged $148.00.

Affidavit Date (and No. Issued)	Amount Stated in Correspond-ing Invoice	Amount Stated in Affidavit	Difference
5. Account: Dennis Sport Shop			
10-1-73 (1)	$ 65.00	$162.50	$ 97.50
Affidavit issued for: Moto-Ski			
6. Account: Gorham Hardware & Sporting Goods			
7-1-73 (1)	$ 46.89	$201.50	$154.61
8-1-73 (1)	67.90	201.50	133.60
9-1-73 (1)	70.20	201.50	131.30
Affidavits issued for: Benjamin Moore Paint			
7. Account: Lee's Studio and Camera Shop			
1-2-74 (2)	$ 80.00	$104.00	$ 24.00
2-1-74 (1)	8/	149.00	149.00
7-1-74 (2)	8/	299.00	299.00
Affidavits issued for:	Kodak, Honeywell, Konica, Bell and Howell, GAF		

8/ Corresponding Invoices were not issued. The accounts receivables establish that Lee's was not charged.

Affidavit Date (and No. Issued)	Amount Stated in Correspond-ing Invoice	Amount Stated in Affidavit	Difference
8. Account: Norman's TV Sales & Service			
1-1-73 (1)	$125.00	$149.50	$ 24.50
2-1-73 (1)	82.00	149.50	67.50
4-1-73 (1)	40.00	100.75	60.75
5-1-73 (1)	98.75	149.50	50.75
6-1-73 (1)	88.75	149.50	60.75
7-1-73 (1)	40.00	149.50	109.50
8-1-73 (1)	50.00	149.50	99.50
9-1-73 (1)	88.75	149.50	60.75
10-1-73 (1)	50.00	149.50	99.50
11-1-73 (1)	131.00	149.50	18.50
12-1-73 (1)	171.00	248.50	77.50
Affidavits issued for: Motorola			
9. Account: Pennock's Appliance			
12-1-73 (1)	$100.00	$207.00	$107.00
10. Account: Renaud Honda			
4-1-73 (1)	$ 70.00	$143.00	$ 73.00
7-2-73 (1)	9/	152.75	152.75
7-1-74 (1)	9/	162.50	162.50
Affidavits issued for: Honda			

9/ Corresponding Invoices were not issued. The accounts receivables establish that Renaud Honda was not charged.

Affidavit Date (and No. Issued)	Amount Stated in Correspond-ing Invoice	Amount Stated in Affidavit	Difference
11. Account: Top Furniture			
4-1-74 (2)	$192.50	$302.50	$110.00
Affidavits issued for: Whirlpool and Hotpoint			
12. Account: TV Lab			
5-1-73 (1)	$100.00	$200.00	$100.00
11-26-73 (1)	87.75	175.50	87.75
1-2-74 (1)	80.00	185.25	105.25
4-25-74 (1)	100.00	191.00	91.00
5-1-74 (1)	100.00	196.00	96.00
6-1-74 (1)	100.00	201.50	101.50
Affidavits issued for: Sylvania and Zenith			
13. Account: Western Auto			
1-2-74 (3)	$210.00	$302.25	$ 92.25
Affidavits issued for: Paulan, Jacobsen and Evinrude			

14. Account: Day's Jewelry and Applicance Store

Affidavit Date (and No. Issued)	Unit Cost of Advertising Stated in Affidavit (per minute)	Unit Cost of Advertising Stated in Invoice (per minute)	Difference
2-1-73 (4)	$6.00	$1.72	$4.28
3-1-73 (4)	6.00	1.71	4.29
4-1-73 (4)	6.00	1.71	4.29
5-1-73 (4)	6.00	2.03	3.97
6-1-73 (4)	6.00	1.98	4.02
7-1-73 (4)	6.00	1.93	4.07
8-1-73 (4)	6.00	2.19	3.81
9-1-73 (4)	6.00	1.95	4.05
10-1-73 (4)	6.00	2.01	3.99
11-1-73 (4)	6.00	1.72	4.28
12-1-73 (4)	6.00	1.71	4.29
1-2-74 (5)	6.00	1.72	4.28

Affidavits issued for: General Electric, Whirlpool, RCA, and "Diamonds" 10/

10/ The overcharges involved in these 14 accounts were $7,876.58.

9. The licensee-applicant also admitted again by formal stipulation that it issued fraudulent affidavits on a regular monthly basis which misrepresented both the cost and quantity of advertising broadcast during the period from February 1, 1969 to December 31, 1972 in connection with the accounts listed in the above chart. The exact amount of these overpayments could not be determined since White Mountain was unable to locate copies of the pertinent affidavits. That there was much more fraudulent billing with regard to the Top Furniture and Pennock's Appliance accounts during the 1969-1972 period than the 1973-1974 period is implicit in the testimonial evidence. 11/

11/ Leon Costello (Leon Costello Tire Company) and Norman Morin (Berlin Furniture Mart) testified that their accounts have been double-billed since 1969.

10. Moreover, the licensee-applicant admitted that it also issued similar fraudulent affidavits to the following additional merchants during the period from February 1, 1969 to December, 1971:

Hallmark Hall of Greetings, Langis Shoe Store, Robichaud Garage, Automotive Sales, Don's Sports Princess Theatre, Louie Catello & Sons, and Morin Wholesalers

The exact amount of these overpayments could not be determined since White Mountain was unable to locate copies of the pertinent affidavits.

11. In addition to fraudulent billing, the record reflects a rebate arrangement with one account: Morin Wholesalers. Pursuant to this arrangement, affidavits

were issued for Schlitz, Morin's co-op account, and sent either via Morin or directly to Schlitz's National Advertiser, Mace, in Milwaukee, Wisconsin. Schlitz paid WMOU-WXLQ for the advertising. White Mountain would then write a check for cash for half the amount of the advertising and take that money to Morin as a rebate. The rebate arrangement began prior to February 1969, the time when Mr. Powell acquired the stations. The record establishes that rebates were made to Morin during the months of July, August, October, and November 1969 and that they totaled $1,298.20. 12/

12/ The record reflects the following rebate checks:

Date	Amount
7-3-69	$133.00
8-8-69	187.00
10-7-69	378.00
11-17-69	599.70

Mr. Powell represented that this rebate arrangement ended on November 17, 1969 when the final check was made out for cash in the amount of $559.70. That check was signed by Mr. Powell. Mr. Powell contended that he had issued "strong orders" to Mr. Dale to stop the rebate arrangement and that Dale's continuance of that arrangement led to his dismissal as general manager. However, Mr. Dale was not dismissed until April 1971, and the rebate arrangement was known to Mr. Powell at the time he signed the check in November 1969. Mr. Powell could not account for this time differential other than to state that the check was not brought to his attention until 1970 by his accountant. However, he admitted signing the rebate check in 1969 and knowing its purpose at that time.

12. Shortly after Mr. Powell acquired the stations, 13/ Mr. Dale, who was then general manager, informed him that the stations engaged in fraudulent billing. Mr. Powell had at least two other conversations with Mr. Dale during the period February 1969 to April 1971 in which Mr. Dale again informed him that WMOU-WXLQ was engaging in fraudulent billing. Mr. Powell admitted that he found out from Mr. Dale as early as 1969 that at least three specific accounts were being falsely billed by the station:

13/ Beginning in May 1969, Mr. Powell visited the station about twice a month. During those visits he consulted with the general manager regarding policy matters, programming, financial matters, personnel and engineering problems. He reviewed sales, profit and loss statements and the aging accounts. He repeatedly urged the station manager to do what he could to increase business.

Day's Jewelry and Appliance, Pennock's Appliance, and Top Furniture. Mr. Powell first stated that during these conversations, he ordered Mr. Dale to stop false billing but that Dale failed to comply with that order. However, upon further examination, Mr. Powell admitted that he neither took nor threatened any action against Mr. Dale and that "it could be true perhaps that [he] wasn't strong enough in [his] instructions to Mr. Dale". He further admitted that he did not order that false billing be stopped, but that it be "phased out". Moreover, Mr. Powell established no specific time during which this "phase out" was to be accomplished, 14/ nor did he ask if

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14/ Mr. Dale testified that if he had received instructions from Mr. Powell to cease double billing he would have done so, that he would have had no choice -- "Powell was the boss".

any other but the three accounts were participating in fraudulent billing arrangements. He did not order Mr. Dale to refuse to accept any additional accounts that insisted on a false billing arrangement. During one 1969 conversation, Mr. Powell admitted that he asked Mr. Dale if fraudulent billing had been stopped. Mr. Dale responded that the practice was continuing. Mr. Powell took no action as a result of this conversation.

13. In 1969 or 1970 Mr. Powell visited representatives from the Day's Jewelry and Appliance and possibly the Top's Furniture accounts and discussed station billing procedures with them. He told the representatives that the station was going to "cease it

[fraudulent billing] over a period of time." He did not tell the representatives that he was going to stop the practice at WMOU-WXLQ immediately. Mr. Powell explained that to have stopped the practice outright would have meant a substantial loss of business. Mr. Powell admitted that the stations did not "cease" false billing with respect to these accounts.

14. In late 1971 or early 1972, after Mr. Gallus became general manager, Mr. Powell had several conversations with him regarding fraudulent billing at WMOU-WXLQ. During these conversations, Mr. Powell instructed that double billing was to be "phased out" at the station, but he again specified no period of time in which this was to be accomplished. He did order Mr. Gallus not to

accept fraudulent billing arrangements with new accounts. 15/ Mr. Gallus never told Mr. Powell that false billing had been stopped at the stations. Yet, after

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15/ Mr. Powell's testimony that he only knew of fraudulent billing with respect to three accounts (Top Furniture, Day's Jewelry and Appliance, and Pennock's Appliance) appears to be inconsistent with his statement in White Mountain Ex-Hibit I where he used language which indicates that his knowledge extended to more than three accounts: "During their [the Commission investigators] stay of several days, I became aware that double billing had not been stopped completely by my staff at WMOU-WXLQ because a few accounts were still being handled that way. On most of accounts which had been double billed, that practice had been stopped." (Emphasis added). Upon cross examination, Mr. Powell was unwilling to state why he used the separate terms "few" and "most" if he allegedly knew of only 3 accounts which were being fraudulently billed. In addition, Mr. Powell's claim in his statement (White Mountain Ex. 1) that double billing had been partially stopped prior to the Commission's investigation is directly contrary to the record evidence which shows that no double billing ended until after the Commission conducted its field investigation in August 1974.

these initial discussions with Mr. Gallus, Mr. Powell made no further inquiries regarding fraudulent billing at the station.

15. Mr. Powell admitted that he failed to compare invoices and affidavits to confirm that his instructions to "phase out" false billing were carried out; that he failed to look at the cash receipts journal, 16/ although it was available to him; that he seldom examined the stations' checkbook, that he never compared the aging of accounts with the affidavits; and that he never issued any memos regarding Commission Rules, Regulations and policies regarding the practice of fraudulent billing. He further admitted that he never issued instructions

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16/ This journal would reflect the actual amounts received from the local accounts.

that false billing was to be stopped at any particular point in time; that he never checked whether any new accounts were being falsely billed after he instructed Mr. Gallus that no new accounts were to be accepted on this basis; and that he did not ask at any time whether double billing had been stopped completely at the stations. 17/

16. Mr. Powell stated that he was knowledgeable in 1969 as to what was involved in fraudulent billing arrangements and that he knew the full implications of engaging in the practice,

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17/ Mr. Gallus testifed that White Mountain ended fraudulent billing after the field investigation in August 1974 and that he visited the accounts involved and told them that such arrangements would be discontinued. However, Norman Charest, owner of Norman's TV and Radio Shack, testified that false billing continued with his account until late 1974 or early 1975.

including loss of license or heavy fine. He stated, however, that the elimination of false billing (with respect to the accounts of which he was aware) would have meant a substantial loss of business to the station and that double billing was necessary in order for the station to compete for business advertising.

17. Mr. Powell engaged in conversations regarding fraudulent billing with The Berlin Reporter's owner, Judy Munro James, and publisher, Howard James. In November 1970, the then Mrs. Judy Munro had a conversation with Mr. Powell in her office at the newspaper during which she "sounded him out" about the practice of false billing at WMOU-WXLQ. Mr. Powell's response was "non-committal." According to Mrs. James, Mr. Powell said

that "I don't think we're doing it. There may be a problem with one or two big accounts. . . ." Mrs. James stated that Mr. Powell said that "he'd certainly look into it". In the spring of 1972, Mr. Powell had a conversation with Mr. James after a New England Press Association meeting at Dartmouth College. During that meeting the practice of fraudulent billing by media was discussed. Following the meeting, Mr. James "confronted" Mr. Powell regarding the practice of false billing at WMOU-WXLQ. According to Mr. and Mrs. James, Mr. Powell was "evasive" as to whether WMOU-WXLQ was

engaging in fraudulent billing. 18/ Another conversation occurred sometime between 1972 and 1974 at the James' home with Mrs. James. She asked Mr. Powell during that conversation why he did not stop false billing at WMOU-WXLQ. Although Mrs. James could not recollect Mr. Powell's specific response, she stated that he was "non-committal" whenever the subject of false billing was raised.

18/ Mr. Powell also recalled a discussion with the Jameses at the spring 1972 meeting concerning fraudulent billing at his stations. Mr. Powell recalled that his response to the James' inquiry was as follows: "What makes you think we're double billing." Mr. Powell admitted that he took no steps to ascertain whether in fact WMOU-WXLQ was continuing to engage in false billing after that conversation with the Jameses.

Logging Violations

18. The licensee-applicant admitted the following violations of the Commission's requirements pertaining to the preparation and retention of logs (Sections 73.281, 73.282, 73.115, 73.285).

(1) WXLQ program logs for the following dates lacked the signatures of all or some of the on duty employees who were responsible for keeping the log during the programming day: April 22, 1973 through May 30, 1973, June 1, 1973 through March 2, 1974, April 1, 1974, April 2, 1974, April 5, 1974, April 6, 1974, April 15, 1974, April 30,

1974, June 15, 1974, June 22, 1974, July 13, 1974, July 17, 1974, July 22, 1974, July 27, 1974 through July 31, 1974, August 2, 1974, August 3, 1974, August 5, 1974 through August 11, 1974, August 16, 1974, and August 18, 1974.

(2) WXLQ program logs for the period January 1, 1973 through August 19, 1974, are all (with the exception of those listed below which could not be located) deficient in the following respects:

(a) They do not contain entries of the time each program begins and ends;

(b) They do not contain entries classifying each program as to type;

(c) They do not contain entries classifying each program as to source;

(d) They do not contain entries showing the total duration of commercial matter in each hourly time segment or the duration

of each commercial message in each hour;

(e) They do not contain entries indicating the name of the organizations or interests on whose behalf public service announcements were broadcast; and

(f) Corrections and additions to the logs are not signed.

(3) The licensee failed to retain WMOU program logs for the following dates: January 4, 1973, July 7, 1973, July 17, 1973, March 3, 1974, March 31, 1974, April 8, 1974,

April 19, 1974 and July 31, 1974.

(4) The licensee failed to retain WXLQ program logs for the following dates: January 1, 1973 through January 5, 1973, January 7, 1973 through February 20, 1973, March 10, 1973, March 18, 1973, March 27, 1973, April 1, 1973, April 4, 1973, June 18, 1973, October 10, 1973, December 5, 1973, February 23, 1974, March 2, 1974 and March 31, 1974.

Meritorious Programming 20/

19. White Mountain submitted a list of twelve station program broadcast prior to August 1974, under the meritorious programming issue added by the Review Board. All but six of the programs were sponsored at least in part. Those programs that were not sponsored are as follows: (1) broadcasts of Berlin City Council Meetings on Monday evenings; (2) interviews with candidates running for public office, 15-30 minutes in length 21/; (3) storm warnings and road condition reports, spot announcements,

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20/ Evidence adduced under this issue, as noted earlier, may only be used in mitigation of the logging violations.
21/ Mr. Powell stated that the frequency of these interviews was dependent "upon the circumstances," i.e., the occurrence of an election.

broadcast when appropriate; (4) hunter's service, spot announcements consisting of information of interest to hunters, broadcast during hunting season; (5) "Sacred Heart Program," religious program broadcast from 6:36 to 6:51 a.m., Monday through Friday; and a Christian Science Program, broadcast early Sunday mornings.

20. The sponsored programs were as follows: (1) "Lunch at the Little Gypsy," live interview program, broadcast daily 12:30 - 1:00 during the months October through May; 22/ (2) "Musicale Francaise," program consisting of French music, commercials, news and announcements, broadcast Sundays from 9:00 to 11:00 a.m.; (3) News in French, five

minute newscast broadcast daily at 5:55 p.m.; (4) "White Mountain Show," a remote broadcast from Gorham consisting of recordings, commercials, news events, interviews with tourists, broadcast daily from 1:00 to 4:00 p.m. during the months June through October; (5) Ski Reports, one-minute reports of snow and ski conditions at nearby ski resorts, broadcast twice daily during the ski season; and (6) Sports: Boston Red Sox games. 23/

22/ Interviewees consist of public officials, congressman, state representatives, members of the Red Cross, etc.

23/ During the period 1969-1971, the stations broadcast local football ("key games towards the end of the season") and during the period 1969-72, the stations broadcast local hockey games.

Conclusions

21. This proceeding was designated for hearing on evidentiary issues to determine whether, and, if so, the extent to which the applicant knowingly engaged in fraudulent billing practices in the operation of Stations WMOU and WXLQ in violation of Section 73.1205 of the Rules; to determine whether, and if so, the extent to which the applicant failed to maintain adequate program logs for Station WXLQ in violation of Sections 73.281 and 73.282 of the Rules; and to determine whether, and if so, the extent to which the applicant has failed to retain program logs in violation of Sections 73.115 and 73.285 of the Rules.

22. It is undisputed and beyond question that beginning in February 1969

and continuing through August 1974, White Mountain knowingly and repeatedly issued affidavits to 14 local Berlin retailers which contained false information concerning the cost and quantity of advertising broadcast on WMOU-WXLO on behalf of these accounts. 24/ The findings also establish that because of these false affidavits manufacturers dealing with these retailers were overcharged more than $7,500 during 1973 and 1974 alone. The exact amount of overcharges for the period 1969-1972 could not be determined since White Mountain was unable to locate copies of the pertinent affidavits. It has been conceded, however, at least with regard to those

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24/ White Mountain also admitted issuing fraudulent bills to eight other local accounts during the period of February 1, 1969 to December, 1971.

accounts discussed at findings, paragraph 9 supra, that the overcharges during 1969-1972 were greater than in 1973 and 1974. Considering this fact, the longer time period, and White Mountain's admission that it regularly issued false affidavits during the 1969-1972 period, it is concluded that the overcharges in 1969-1972 were at least twice as much as in 1973 and 1974. In addition to this extensive fraudulent billing, White Mountain also participated in a rebate scheme in 1969, whereby White Mountain rebated to Morin Wholesalers one-half the advertising money it received from Schlitz Breweries.

25/ The amount of these rebates totalled $1,298.20.

23. Moreover, the findings establish that Mr. Powell was aware that WMOU-WXLQ were engaging in fraudulent billing; that he was aware that the Commission's Rules prohibited such fraudulent activities; and that he nevertheless failed to end false billing at the stations. In 1969, shortly after he acquired the stations, Mr. Powell was told by the general manager that the stations engaged in fraudulent billing with respect to three major accounts constituting a large portion of White Mountain's revenues. Mr. Powell did not order the general manager to stop the practice of fraudulent billing with respect to these accounts. Rather, he stated that false billing should be "phased out". He never established a time frame during which this "phase out" was to be accomplished.

Further, he did not order the general manager to refuse to accept new accounts on the basis of fraudulent billing arrangements. The findings also establish that although in 1969 or 1970 Mr. Powell visited representatives of two of the accounts involved in false billing to discuss ending the practice, the stations did not stop fraudulent billing with respect to these accounts.

25. The evidence convincingly shows that in 1971, Mr. Powell was aware that false billing had not ended at WMOU-WXLQ, and he in fact instructed the new general manager that false billing was to be "phased out". He again, however, established no time frame during which this "phase out" was to be accomplished.

This seems clearly the case despite the disclaimer in White Mountain's Reply Findings that newly hired salesmen in 1973 and 1974 were told by Powell not to take any double billing accounts. Even taking such disclaimer at face value, it would only relate to new accounts as if one should place high merit on the fact that fewer accounts were being double-billed in June-August 1974 than in earlier periods. The compelling and glaring evil is that rather than all double billing being brought to an abrupt halt, it continued at least until August 1974. Actually, after 1971 Mr. Powell made no further inquiries at the stations as to whether fraudulent billing had ceased. Need it be added, that Powell signed all

the false affidavits received in evidence and did not compare the affidavits with the invoices to determine the progress of the "phase out" or whether fraudulent billing existed with respect to other accounts. Also in 1972, Mr. Powell was approached by the publisher of The Berlin Reporter and confronted about the practice of false billing by WMOU-WXLQ. Even after this "confrontation", the evidence demonstrates that Mr. Powell took no effective steps to end the fraudulent billing practices engaged in by WMOU-WXLQ. Indeed, to repeat, fraudulent billing did not end at WMOU-WXLQ until the Commission uncovered these gross improprieties as a result of its August 1974 field investigations. 26/

26/ Fraudulent billing continued with respect to one account (Norman's TV and Radio Shack) until late 1974, early 1975.

25. The Commission has emphatically declared that fraudulent billing practices constitute a serious violation of Commission Rules. 27/ Wharton Communications, Inc., 44 FCC2d 489 (1973); United Broadcasting Company of Florida, Inc., 55 FCC2d 832 (1975); Blackstone Broadcasting Corporation, 52 FCC2d 1106 (1975). Under the evidence in this case and in light

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27/ Section 73.1205 of the Commission's Rules provides in pertinent part as follows:

> "No licensee of a . . . broadcast station shall knowingly issue to any . . . advertiser . . . or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such . . . document is issued . . . . Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

of fresh precedent, and the failure in great dimension of mitigating or even compassionate circumstances, White Mountain's false billing practices imperatively call for the imposition of a severe judgment -- a short term renewal of the licensees plus other sanctions.

26. True, here, as in Wharton, Mr. Powell knowingly and repeatedly allowed fraudulent billing practices to continue with numerous (22) co-op advertisers over a prolonged period of time. In Wharton, as in this case, the licensee was aware of the Commission's Rules and policy prohibiting the use of broadcast facilities for fraudulent billing practices and yet it nevertheless repeatedly disregarded this proscription until

discovered by the Commission. In Blackstone, supra, while the Commission assessed the maximum forfeiture and granted a one year renewal of license in lieu of a denial of renewal, it distinguished the false billing practices in Blackstone from those in Wharton on the principal basis that in Blackstone a small number (two) advertisers was involved in the fraudulent billing practices and the amounts of additional co-op credits received by the two local advertisers was nominal. In this case, at least 22 local advertisers were involved in the fraudulent scheme and it can reasonably be concluded that the unjust enrichment to local advertisers was in excess of $15,000. A much more than nominal sum.

27. In United, supra, the most recent fraudulent billing case, the Commission denied a renewal of license where the licensee, an absentee-owner, claimed lack of knowledge of the improprieties engaged in by the station. The Commission rejected this defense. It held that the principals failed to comply with the requirement of Rule 73.1205 that it "exercise reasonable diligence to see that their agents and employees do not issue any documents" containing false information or which misrepresent the nature or content of advertising. The Commission further held that such a lack of supervision and failure to respond adequately to prevent wrongdoing was tantamount to an intentional disregard of Commission

Rules 55 FCC2d at 838-839. Unlike the "absentee owner" situation presented in United, Mr. Powell admitted knowledge of fraudulent billing activities.

28. Even assuming that the evidence demonstrates that WMOU-WXLQ's programming was meritorious, 28/ a notion not fully persuasive, it could not be used to mitigate the fraudulent billing violations and could only be used in mitigation of the logging violations. The evidence also

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28/ It is noted that White Mountain's meritorious programming showing included only six programs that were not sponsored; two consisted of spot announcements, two were early morning religious broadcasts, one consisted of interviews with candidates at election time, and one consisted of broadcasts of Berlin City Counsel meetings. It is submitted that White Mountain has not demonstrated how this programming warrants special merit. Nor has White Mountain established that any of the sponsored programs was of an exceptional nature.

reflects that White Mountain admitted numerous violations of Sections 73.281, 73.282, and 73.285 of the Commission's Rules, pertaining to retention of program logs and maintenance of adequate program logs in connection with WXLQ, and numerous violations of Section 73.115 of the Commission's Rules pertaining to retention of program logs in connection with WMOU.

29. It is no earthshaking discovery to observe that denial of renewal, as with revocation of a broadcast application, is the most severe penalty that can be meted out by this agency -- not unlike a kind of death penalty. And in deserving cases there should, and can be, no timid retreat from its imposition.

30. The practices disclosed in the record evidence here, rather than being accorded that mild euphemism "distasteful" are, most emphatically, reprehensible. "Double-billing" is, in fact, nothing less than fraudulent conduct contrived and carried into effect by more than one party; certainly more than the so-called principal wrongdoer, the responsible licensee. There are, of course as here, the individual local advertiser/sponsors of commercial broadcast announcements who knowingly participate in the practice, if not demand it. And, while these parties are nominally beyond the reach or sanction of this agency, nevertheless they are co-principal beneficiaries of the apparent unjust enrichment of getting valuable broadcast time at a hidden

premium; often at less than half the charge billed to their manufacturer/ supplier. This, not to speak of handsome cash rebates after the manufacturer/ supplier or his agent has paid the bogus and fraudulently verified sum to the station licensee who in turn divides, by whatever pre-agreed sum, with the local sponsor/advertiser.

31. The easy judgment which brands the licensee as the most prominent male-factor, and the sole evil-doer, is simply too easy; it is a painless glossing over of otherwise disturbing and hidden un-answered questions. While it is very true, in this modest forum, matters of national peril are light years beyond its normal concern, it seems much too much to damn the licensee with a fatal

blow and leave the matter there. Though the licensee deserves and will get his just due, overkill here would be not only unjust, but irrational. This, in spite and in recognition of the otherwise opposite cases of Wharton and United, supra, cited by the Bureau.

32. Why would it be irrational under the evidence here, and only here, to deal the fatal blow of non-renewal? Where is the compelling mitigating evidence which prompts distinction and different treatment than in Wharton and United? Didn't Powell know the practice was actively being pursued at his stations and didn't he know of and had sufficient warning knowledge of Commission published policy respecting the practice of "double-billing"? The answers are unequivocally

yes in the evidence not to mention that the money sums here involved are considerable, if not great, rather than nominal.

33. Our system of positive law grounded as it is in the rational recognition and application of human reason and experience eschews any notion that exculpation is at hand on the simplistic thesis that others in the peer group of the accused also practice the black art of deception. Powell seems to have taken this tack at one point when he responded that the practice is difficult to cut out "when your competitors are doing it". Such a rationale is not only self-defeating, but more -- self-deceiving and as a defense tactic to be rejected out-of-hand. Yet it does not seem a

dispensing of uneven justice -- assuming equal or less grave evidential conditions existed in Wharton and United -- if what this trier-of-fact after imposition of a heavy penalty, albeit less than fatal, perceives from the evidence; that the main generating forces of the deception escape all sanction, retain the full fruits of their deception and bask in the euphoria of the innocent. Passing over the silence of those apparently victimized, these, of course, are the local co-op advertiser/sponsors of commercial broadcast matter on the subject stations. While this condition hardly cleanses the Powell conduct -- he, the licensee of franchises of great public trust -- it does suggest a penalty this side of life

imprisonment; certainly this side of the death penalty.

34. Assuming "double-billing" is anathema to the broadcast advertising community -- and particularly that part of the community represented here, several of no mean national industrial stature -- e.g., Kodak (Eastman Kodak Company), Fridgidaire (General Motors Corporation), Sylvania and Zenith Corporations, General Electric Company, RCA, among others -- where is the hoped for outcry of those offended by these sordid practices? Is it that they are completely unaware of the disclosures in this record and that "double-billing" by broadcasters is totally foreign to their experience and knowledge? Should this be so, have the injured parties

pursued or do they plan to pursue available remedies (legal and business) against their wrongdoing dealers and retailers, there in the environs of Berlin, New Hampshire? Did the offended parties seek the opportunity, once the matter was disclosed publicly, by the Commission's Designation Order and the Bureau's Bill of Particulars, to assist in the Commission's objective, of ridding the practices among its licensees? Concededly, no affirmative duty to so act can be imposed on those apparently victimized by the double-billing practices. But it is also to be noticed that the evidence discloses no general disenfranchisement or other disciplining of dealer/retailers by their manufacturer/supplier, those who apparently have borne the burden and

brunt of the false affidavits and false invoices to which their dealer/retailers were active parties.

35. Thus, it seems clear and disturbing that it is not so much that the evidence abundantly reveals misconduct of the licensee; it is rather, through the thunderous silence of those apparently wronged, what the record evidence does not reveal. Are these business practices -- hopefully in extremis -- a silent game knowingly played and accepted by all participants, ending only when a broadcast licensee is tagged?

36. There is more than a hint in the evidence as to the parties to the practices in this case that the practice "is going on all over the place" and that "the unfortunate thing is though when your competitors are doing

it, it's difficult to cut it out". That it should be "cut out" is beyond question; but in fashioning the remedy, as the Commission stressed in the Designation Order, supra, the "judgment is, of course, to be made on the facts of each case".

37. The principal of White Mountain asserted that he planned -- albeit at a very late hour -- an attempt to effect restitution; an effort abandoned, so he states, on what would seem imprudent, if not questionable, advice, In any event, a cardinal mandate under the evidence demands a full restitution of the amounts unjustly acquired -- to the penny -- and this must be a condition precedent before any balancing of the equities leading to judgment may be made. That condition precedent is imposed.

38. The manner of restitution, be it in actual cash or the equivalent in commercial broadcast time, will be left to the participants, so long as there is full formal acceptance of the manner by the advertiser parties who seemingly were victimized. Hence, within thirty (30) calendar days of the release of this Initial Decision, White Mountain Broadcasting Company shall file a verified statement of the terms and conditions, in depth and detail, of the agreed restitution process; and that, in any event, full restitution must be effectuated within three (3) months of the date of the release of this Initial Decision. A further formal filing, then, covering completion of the restitution within this time period must also be forthcoming.

39. Failing that, in any material respect, shall terminate the tenure of the licensee of Stations WMOU and WXLQ (FM), whatever the posture of the limited renewal of the licenses here involved. In this respect and recognizing that this is but an Initial Decision subject to the broad reach of exception and review under Rule 1.276, this Initial Decision shall be a self-executing judgment (Aetna Casualty & Surety Co. v. Board of Supervisors of Warren County, 168 S.E. 617, 629).

Accordingly, for the aforesaid reasons and with the affirmative imposition of the full restitution requirement above, the public interest and the ends of justice so warranting, IT IS ORDERED that the instant renewal applications

of White Mountain Broadcasting Company, Inc. BE AND HEREBY ARE RENEWED for the TERM OF ONE (1) YEAR: and

IT IS FURTHER ORDERED that, premised on the repeated violations of Section 73.1205, and Sections 73.281, 73.282, 73.115 and 73.285 of the Commission's Rules, White Mountain Broadcasting Company, Inc., SHALL FORFEIT the sum of TEN THOUSAND ($10,000) DOLLARS, payable to the Federal Communications Commission pursuant to Section 1.621 of the Commission's Rules. 29/

James F. Tierney
Administrative Law Judge
Federal Communications
Commission

29/ As noted earlier and in the unlikely event no exceptions are filed, or the case is not reviewed on the Commission's own motion, this Initial Decision shall become effective fifty (50) days after its public release, pursuant to Section 1.276(d) of the Rules.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1979, three copies of the Petition for a Writ of Certiorari in the case of White Mountain Broadcasting Co., Inc. v. Federal Communications Commission were mailed, postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C., 20530. As a courtesy, three copies of the Petition for a Writ of Certiorari in this case were mailed, postage prepaid, to Daniel Armstrong, III, Esq., Office of the General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C., 20554. I further certify that all parties required to be served have been served.

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No. 79-315

In the Supreme Court of the United States

OCTOBER TERM, 1979

WHITE MOUNTAIN BROADCASTING CO., INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-19a) is reported at 598 F.2d 274. The decisions of the Federal Communications Commission (Pet. App. 27a-55a, 20a-26a) are reported at 60 F.C.C.2d 342 and 61 F.C.C.2d 472. The decision of the Administrative Law Judge (Pet. App. 56a-118a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1979. A petition for rehearing was denied on May 30, 1979 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on August 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission acted arbitrarily in denying license renewal to a broadcast licensee whose president and sole stockholder knowingly permitted his station repeatedly to violate the Commission's fraudulent billing rule over a five-year period.

STATEMENT

The Federal Communications Commission, after a full evidentiary hearing, denied petitioner White Mountain Broadcasting Co., Inc.'s application for renewal of licenses for a standard radio station, WMOU, and an FM Station, WXLQ, both in Berlin, New Hampshire. The Commission took. this action based on undisputed evidence that petitioner had engaged in flagrant and protracted fraudulent billing activities in violation of the Commission's rules.

The evidence adduced in the administrative hearing established that from February 1969 to August 1974 petitioner had regularly engaged in the practice of sending two bills to local advertisers for commercials broadcast on petitioner's station. One bill reflected the actual cost and quantity of advertising broadcast, which the local advertiser would pay to petitioner; the other bill stated inflated amounts which the local advertiser would send to the national advertiser to induce the national advertiser to pay the local advertiser more than its proper share of advertising costs under usual cooperative advertising agreements (Pet. App. 10a). This practice was in violation of the Commission's rules, which prohibit licensees from issuing any bill "which contains false information concerning the amount actually charged by the licensee for the broadcast advertising * * * or which misrepresents the quantity of advertising actually broadcast * * *." 47 C.F.R. 73.1205.

The record also showed that shortly after acquiring the stations in 1969, petitioner's president and sole stockholder, Robert Powell, had been expressly informed by his general manager that his stations were engaged in fraudulent billing. At the hearing, Powell conceded that he knew that fraudulent billing violated Commission rules and that fraudulent billing might result in the loss of his stations' licenses. Nevertheless, he took no affirmative steps to stop the practice, and it continued at least until the Commission began an investigation in August 1974 (Pet. App. 33a-38a). To the contrary, Powell participated in such practices by executing numerous affidavits containing false information concerning the cost and quantity of the advertising broadcast (Pet. App. 35a).

Emphasizing its repeated past public notices and rulemakings warning licensees of the seriousness of fraudulent billing, the Commission concluded that the appropriate sanction in this case was to deny renewal of petitioner's licenses. This sanction, the Commission observed, was consistent with Commission policy and previous Commission decisions denying renewal for fraudulent billing practices that were less extensive and serious than the practices established by this record (Pet. App. 38a-44a).

The court of appeals affirmed the Commission's order (Pet. App. 7a-19a). The court rejected petitioner's argument that the order should be set aside because the Commission had failed to distinguish its action in this case from its grant of license renewals to stations owned by Columbia Broadcasting System in *CBS, Inc.*, 69 F.C.C.2d 1082 (1978), notwithstanding violations that petitioner claimed were more serious than its own. On the basis of its review of the facts in the *CBS, Inc.* case, the court found that the differences between the two cases were "so obvious as to remove the need for explanation"

(Pet. App. 16a; quoting from *Melody Music, Inc.* v. *FCC*, 345 F.2d 730, 732-733 (D.C. Cir. 1965)).[1] The court concluded (Pet. App. 19a) that petitioner's "attempt to convert this case into a vehicle for demonstrating a Commission bias in favor of 'media barons' and against the small, struggling radio stations falls far short of its mark."

ARGUMENT

The court of appeals correctly rejected petitioner's contention (Pet. 14-34) that the Commission has discriminated against it by imposing more severe sanctions (denial of license renewal) on it than it has imposed on other licensees who have committed what petitioner believes to have been more serious offenses. This contention is incorrect.

The Commission's decision denying renewal to White Mountain is consistent with its long standing policy condemning fraudulent billing by broadcast licensees. Since 1962, the Commission has issued a series of public notices and rulemakings that have clearly and repeatedly warned that fraudulent billing is contrary to the public interest and that any licensee engaging in this practice

[1]The court also noted White Mountain's reference to the renewal of licenses of two antitrust violators in *General Electric Co.*, 45 F.C.C. 1592 (1964) and *Westinghouse Broadcasting Co.*, 44 F.C.C. 2778 (1962). The court observed that, unlike the *CBS* case, these matters occurred long before the Commission's proceeding on White Mountain's applications and that there was therefore no excuse for White Mountain's failure to raise them at the agency level (Pet. App. 16a n.14). The court further observed that, in any event, renewals notwithstanding antitrust violations not directly related to the use of broadcast facilities will not stand as precedent for the automatic renewal of all broadcast licenses some fifteen years later, and that the Commission was not required to distinguish them every time a licensee is denied renewal (Pet. App. 16a n.14).

risks a loss of its license.[2] Furthermore, as the court of appeals observed (Pet. App. 18a-19a), in the absence of strong mitigating circumstances,[3] the Commission has consistently implemented this policy and denied license renewal in double billing situations.[4] Thus, in the instant case, where the undisputed evidence established both an extensive and pervasive scheme of fraudulent billing and the knowing failure of petitioner's principal to take effective action to stop such practices, denial of license renewal was consistent with established Commission policy and with Commission treatment of other licensees found to have similarly disregarded the fraudulent billing rule.

[2]See *Public Notice B, Broadcast Licensees Warned Against Engaging in Double Billing*, 44 F.C.C. 2828 (1962); *Fraudulent Billing Practices*, 1 F.C.C.2d 1068 (1965); *Applicability of Fraudulent Billing Rule*, 1 F.C.C.2d 1075 (1965); *Fraudulent Billing Practices*, 23 F.C.C.2d 70 (1970). Indeed, in 1972—during the very period in which petitioner was engaging in fraudulent billing—the Commission issued yet another public notice reiterating its position on fraudulent billing and emphasizing the serious question such violations raise concerning qualifications to remain a licensee. *In the Matter of Renewal or Revocation Hearing Proceedings in Future Fraudulent Billing Cases*, 38 F.C.C.2d 1051 (1972).

[3]The court noted that in some instances where the Commission has found specific mitigating circumstances, it imposed a lesser sanction, (Pet. App. 18a-19a n.20). The Commission in this case, however, specifically found that such circumstances were absent here and that the cases were factually distinguishable. Furthermore, petitioner did not claim that those other fraudulent billing cases were applicable here (Pet. App. 44a).

[4]See *Berlin Communications, Inc.* 68 F.C.C. 2d 923 (1978), aff'd, No. 78-2048 (D.C. Cir. Oct. 25, 1979); *WLLE, Inc.*, 65 F.C.C. 2d 774 (1977), aff'd mem., No. 77-1787 (D.C. Cir. Jan. 23, 1979), cert. denied, No. 78-1721 (Oct. 1, 1979); *Monroe Broadcasters, Inc.* 60 F.C.C.2d 792 (1976); *Eastminster Broadcasting Corp.*, 58 F.C.C.2d 24 (1976), aff'd mem., No. 76-1792 (D.C. Cir. June 8, 1977); *United Broadcasting Co. of Florida, Inc.*, 55 F.C.C. 2d 832 (1975); *Wharton Communications, Inc.*, 44 F.C.C.2d 489 (1973).

Petitioner's claim that the Commission's action in this case is contrary to its actions in certain other cases cited by petitioner—and thus allegedly reflects discriminatory treatment—is unfounded. First, as a matter of law the Commission has broad discretion to choose the remedies and sanctions to be imposed in particular cases. See *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). Judicial review of agency sanctions is limited to whether the sanction involved was "unwarranted in law" or "without justification in fact," *Butz* v. *Glover Livestock Comm'n Co.*, *supra*, 411 U.S. at 186, and where, as here, a particular sanction is supported by substantial evidence, that sanction is not otherwise rendered invalid because it is more severe than sanctions imposed in other cases. See *Butz* v. *Glover Livestock Comm'n Co.*, *supra*, 411 U.S. at 187-188, *FCC* v. *WOKO, Inc.*, *supra*, 329 U.S. at 227-228. Moreover, the Commission is certainly not required in each case expressly to distinguish every other case in which it has decided not to impose the same sanction.

Some cases, including *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965), on which petitioner relies (Pet. 15), have held that when the imposition of a sanction is alleged to conflict with very similar cases in which the sanction was not imposed, the Commission is required by general administrative law principles to explain the reasons for the different treatment, unless the differences between the cases are "so 'obvious' as to remove the need for explanation" (345 F.2d at 732-733). Contrary to petitioner's claim (Pet. 15), however, the court in this case did not depart from the principles stated in *Melody Music, Inc.* Indeed, it expressly reaffirmed those principles and held that the differences between the cases cited by petitioner and this case were so obvious as to remove the need for explanation (Pet. App. 16a).

Thus, with respect to the *CBS, Inc.* case on which petitioner relies (Pet. 11, 20-21), the court carefully explained that that case involved, *inter alia*, a single isolated misrepresentation by the licensee and that the licensee made full disclosure to the public in two special broadcasts (Pet. App. 16a-18a). In contrast, the facts of this case, as the court observed (Pet. App. 18a), established a fraudulent course of conduct extending over a five and one-half year period. Moreover, the Commission specifically had warned against this conduct and White Mountain's president and sole stockholder –who knew of and participated in the fraudulent conduct – specifically was aware that he was risking loss of his licenses by engaging in this practice.

The court also correctly rejected petitioner's reliance on other cases involving antitrust violations (see Pet. 12, 17-18) on the ground that those violations did not directly relate to the use of broadcast facilities and also on the ground that petitioner had not relied on those cases before the Commission (Pet. App. 16a, n.14). Beyond its bare assertions, petitioner offers no reasons for disagreeing with the court of appeals' conclusion that all the cases on which petitioner relies are readily distinguishable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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